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REPORT

OF THE

REPORTED DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF MISSISSIPPI

FROM

DECEMBER 1850 TO FEBRUARY 1851.

EDITED BY

JOHN W. WALKER

BY P. I. A. DESLIX.

Attorney at Law.

NEW ORLEANS.

Printed by A. L. RICHARDS, Chargeur d'Affaires.

1851.

DIGEST

OF THE

REPORTED DECISIONS

OF THE

SUPREME COURT

OF THE

STATE OF LOUISIANA

FROM

DECEMBER 1838 TO FEBRUARY 1843.

COMPILED AND PUBLISHED

BY P. J. A. DESLIX,

Attorney at Law.

NEW-ORLEANS:

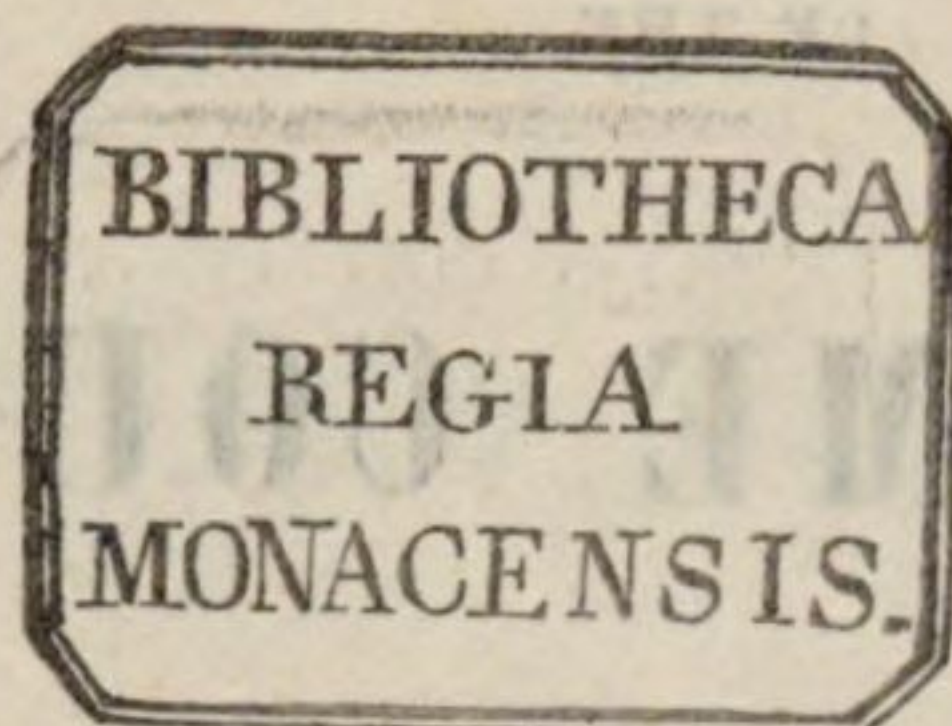
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1845.

DIGEST

OF THE

REPORTED DECISIONS



OF THE

STATE OF LOUISIANA

Entered, according to Act of Congress, in the year 1844, by P. J. A. Deslix, in the office of the United States Court of the Eastern District of Louisiana.

DECEMBER 1838 TO FEBRUARY 1843

COMPILED AND PUBLISHED

BY P. J. A. DESLIX.

Attorney at Law.

NEW-ORLEANS:

Printed by J. L. Solier--135 Chartres street.

1843

TO THE BENCH AND BAR OF LOUISIANA.

To facilitate my own researches, and with the view to continue, as fully as possible, the *DIGEST* of *Messrs. Benjamin and Slidell*, I have extracted, from the 13th, 14th, 15th, 16th, 17th, 18th and 19th volumes of the *Louisiana Reports*, and from the 1st, 2d and 3d of *Robinson's Reports*, the various points, decided by the Supreme Court in these ten volumes *and indicated by the Reporters*; I have classed these points under appropriate titles, added a table of contents and a *double index* of cases with reference to the names of both plaintiff and defendant and to the volume and page of each decision.

Several of my legal brethren, to whom this compilation was shown, have considered the work as affording facilities for research, and thought it would be useful to the judges of our Courts and to the members of the bar, and have therefore advised me to publish it.

Thus encouraged, I take the liberty of dedicating this Book to the *Bench and Bar of Louisiana*, and respectfully request their indulgence and support.

P. J. A. DESLIX.

ALFRED KENNEN.

TO THE BENCH AND BAR OF LOUISIANA.

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E. J. A. DESJAY.

The following certificate has been handed us.

New-Orleans, 25th March 1845.

P. J. A. DESLIX, Esq.

DEAR SIR,

I have carefully read the sheets, which you have regularly handed me, as fast as printed, of your Digest of the Decisions of the Supreme Court of this State, embraced in the 13th, 14th, 15th, 16th, 17th, 18th and 19th volumes of the Louisiana Reports, and in the 1st, 2d and 3d volumes of Robinson Reports. I have also consulted them frequently since, and am able to say with confidence, that you have extracted with great fidelity and accuracy the various points contained in the judgments of the Court and indicated by the reporters.

Your work will unquestionably be of great utility to the bar, as well as to the community in all researches into the jurisprudence of the State as settled by its highest tribunal.

The labour you have bestowed on this book has been very great and it deserves, and will certainly obtain, success and patronage; which I most sincerely wish you.

I am your Obt. Servt.,

ALFRED HENNEN.

The following certificate has been handed me

The Chairman, 2nd March 1885

P. J. A. BELLIX Esq.

DEAR SIR,

I have carefully read the sheets which you have regularly handed me, as last as printed of your Digest of the Decisions of the Supreme Court of this State, embraced in the 13th, 14th, 15th, 16th, 17th, 18th and 19th volumes of the Louisiana Reports, and in the 1st, 2d and 3d volumes of Robinson Reports. I have also consulted them frequently since; and am able to say with confidence, that you have extracted with great fidelity and accuracy the various points contained in the judgments of the Court and indicated by the reporters.

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I am your Obedt. Servt.

ALFRED HENRY

DIGEST

OF THE

DECISIONS OF THE SUPREME COURT

OF THE

STATE OF LOUISIANA

Judges of the Supreme Court during the time embraced by
this volume.

ACCESSION

1. By the **HON. FRANCOIS XAVIER MARTIN,**
PIERRE ADOLPHE ROSS,
GEORGE EUSTIS,
GEORGE STRAWERIDGE,
ALONZO MORPHY,
HENRY A. BULLARD,
EDMOND SIMON,
RICE GARLAND.

By the **HON. FRANCOIS XAVIER MARTIN,**
PIERRE ADOLPHE ROSS,
GEORGE EUSTIS,
GEORGE STRAWERIDGE,
ALONZO MORPHY,
HENRY A. BULLARD,
EDMOND SIMON,
RICE GARLAND.

2. Where the defendant in a proprietary action has established the
value of the improvements made by him on the premises, and
plaintiff seeks under art. 699 of the Civil Code, which gives to the
owner of the soil on which plantations or constructions have been
made by a third person, the election either to reimburse the value
of the materials and the price of workmanship, or to pay a sum
equal to the enhanced value of the soil, to guard himself of the
perils by paying the enhanced value, he must show the amount
of such enhanced value. *Ross v. Huntley*, 2 R. R. 187.

3. In an action by one claiming land under a patent from the
United States, against a party in possession who had made valuable
improvements thereon, the latter will be entitled to claim the
excess of the value thereof above the price received since the
commencement of art. *Kellum v. Rogers*, 2 R. R. 189.

Judges of the Supreme Court during the time embraced by
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DIGEST

OF THE

DECISIONS OF THE SUPREME COURT

OF THE

STATE OF LOUISIANA.

ACCESSION.

1. By the Roman law, one who made constructions on soil which he knew to belong to another, was presumed to be willing to lose his materials, and had no claim against the owner of the ground, who acquired an absolute right to whatever was erected on it. By the laws of this State, Civil Code, art. 500, the owner of the soil has the right to have the buildings removed at the expense of the person who erected them, or to keep them on paying the value of the materials and the price of the workmanship; but, until this election be made, such works, though subject to the right of acquisition given to the owner of the soil, continue to belong to, and are at the risk of the party who erected them. *Baldwin v. Union Insurance Co.*, 2 R. R. 133.

2. Where the defendant in a petitory action has established the value of the improvements made by him on the premises, and plaintiff seeks, under art. 500 of the Civil Code, which gives, to the owner of the soil on which plantations or constructions have been made by a third person, the election either to reimburse the value of the materials and the price of workmanship, or to pay a sum equal to the enhanced value of the soil, to avail himself of the privilege by paying the enhanced value, he must shew the amount of such enhanced value. *Rivas v. Hunstock*, 2 R. R. 187.

3. In an action by one claiming land under a patent from the United States, against a party in possession who had made valuable improvements thereon, the latter will be entitled to claim the excess of the value thereof above the fruits received since the commencement of suit. *Kellam v. Rippey*, 3 R. R. 138.

4. Where it is proved that the land claimed by the plaintiff would be equally, or more valuable to him with the timber on it. Defendants, who were mere trespassers, will not be allowed any thing for the expense incurred by them in clearing it. *Baillio v. Burney*, 3 R. R. 317.

ACCOUNT.

1. An account bears interest from its liquidation; and will be considered as liquidated from the time when it was rendered, if not objected to within a reasonable time. *Shaw v. Oakey*, 3 R. R. 361.

2. An unliquidated account bears interest from judicial demand. *Id.*

ACT, AUTHENTIC.

1. In an act executed before a Notary by a party who signs it by his mark, it is not necessary that it should appear that it was read or explained to him. It will be presumed, if he did not read it himself, that it was read to him by the Notary. *McDonough v. Fost*, 1 R. R. 295.

2. A notarial act, by which it was agreed that certain lines should form the boundary between the lands claimed by the parties thereto, not recorded in the office of the Parish Judge, is void as to third persons, or innocent purchasers without notice. *Kittridge v. Landry*, 2 R. R. 72.

3. A direct action is not necessary to establish the falsehood of a notarial act; it may be shown collaterally. *De Blanc v. Martin*, 2 R. R. 82.

4. A notarial act will be presumed to be correct, unless the evidence leaves no reasonable doubt of the contrary. *Id.*

ACTION.

1. A party having a separate and independent right of action, is under no obligation, and can not be required to intervene in a suit, or cumulate his action with others litigating about the same matter. *Le Blanc v. Dashiell*, 14 L. R. 274.

2. Two demands, clearly inconsistent and exclusive of each other, can not be cumulated in the same action; but the plaintiff may make his election at the trial, which one he will proceed with. *Morgan v. Whiteside's curator*, 14 L. R. 277.

3. The revocatory action to set aside a contract by an insolvent debtor to a creditor, to secure a just debt, is only applicable to a particular class of cases in which the only ground of nullity is *an undue preference* given to one of them; and suit must be brought within a year, from the date of such contract. *Caldwell et al. v. Atchafalaya Bank*, 14 L. R. 308.

4. But the revocatory action may be brought within a year, by a single creditor, from the date of his judgment against his debtor; or by a syndic representing *all the creditors*, within a year, from his appointment, to set aside all *contracts* of the insolvent debtor *by which creditors are injured*. *Id.*

5. A hypothecary action is one of a real nature, whether the property mortgaged be in the hand of the mortgagor, or in the possession of a third person. *Elwyn v. Jackson et al.* 14 L. R. 411.

6. A sale of slaves by authentic act, can not be disregarded or attacked callaterally, it can only be set aside by the revocatory action. *Morton v. Crosby et al.*, 14 L. R. 424.

7. The plaintiff may join an action to annul a contract or transfer of property made by his debtor to another person, to recover it from creditors, to the principal demand against such debtor. *Lambeth & Thompson v. McMurray et al.*, 15 L. R. 466.

8. Where two of the original plaintiffs in a *joint action*, die after judgement, and a rule is taken by the other seven on the surety in the bail bond, to show cause why he should not pay their share of the judgment: *held*, that the judgment severed their *joint interest*, and that each has a right to recover his virile share from the surety. *Opothlarholer et al. v. Gardiner*, 15 L. R. 512.

9. In a possessory action, the plaintiff must show his possession by definite objects, and that he has been disturbed. Where the *locus in quo* is uncertain, so that it is impossible to determine whether the defendant's possession extends, or not, over any part of the tract claimed by the plaintiff, he cannot recover. *Morgan v. Driggs et al.*, 15 L. R. 451.

10. In a possessory action in order to bring the case within the doctrine recognized in the decision of *Ellis vs Prevost*. 13, Louisiana Reports, 230, the plaintiff must show, not only acts of limited and restricted possession, but also indicate by legal evidence, the extent and full limits of the property of which he claims the possession. *McDonough v. Childress et al.*, 15 L. R. 556.

11. Where the plaintiff, in a possessory action, fails to show that he possessed, actually to a certain extent and limits, the tract of land he claims, he can not recover. *Id.*

12. It is insufficient, for one who alleges his possession to extend to a large tract of land, with well defined limits and boundaries, to prove only acts of possession to a small part or fraction of it. *Id.*

13. The allegation of ownership is necessary in a possessory action, in order to show the capacity in which the party claims possession of the property. *Kemper's heirs v. Hulick*, 16 L. R. 44.

14. Where the prayer of the petition shows it to be exclusively a possessory action, the defendant, by setting up title, can not turn it into a petitory one. *Kemper's heirs v. Hulick*, 16 L. R. 44.

15. If the debt is in existence, and has *accrued*, although it be not due at the time of a judgment obtained or contract made in fraud of creditors, it will authorize the complaining creditors to institute the revocatory action to annul and set aside such contract or judgment. *Stein v. Gibbons & Irby*, 16 L. R. 103.

16. The attacking creditor, who seeks to annul a judgment or contract made in fraud of creditors, must bring his *action* within one year from the date of his judgment. *Id.*

17. In an action on a contract and on a tort against several defendants, they will be allowed to sever in their defence and trial; even co-trespassers may plead and be tried separately; *a fortiori* when one defendant is sued on a contract and the other on a tort. *Arrowsmith v. Mayor et al.*, 17 L. R. 419.

18. When title in third persons is sought to be divested on the ground of fraud or simulation, recourse must be had to a direct *action* of revocation, when the parties are entitled to a jury. *Samory v. Hebrard et al.*, 17 L. R. 555.

19. The proceedings under the 13th section of the act of 1839, is intended to get at property in the possession of third persons belonging to the defendant, but can not be substituted for the revocatory action. *Id.*

ACTS.

1. Discrepancies in a notarial act of sale and of protest, which appear to be mere clerical errors, and are immaterial to the decision of the case, do not affect the validity of such acts. *Pepper et al, v. Dunlap*, 16 L. R. 163.

ACT SOUS SEING PRIVÉ.

I. Proof of the signature of the grantor, and of one of the subscribing witnesses residing in an other State, is sufficient evidence of the execution of a deed *sous seing privé*. *Thomas v. Turnley*, 3 R. R. 206.

ADMINISTRATOR.

1. Opponents of a deceased administratrix's account can not

blend what may have taken place by her administrator, subsequently, in relation to *her estate*, with her account filed of her administration of another person's estate. *Filhiol's Heirs vs. Hempink*, administrator &c., 16 L. R. 326.

2. The administration of the estate of a deceased administratrix is separate from her account of her administration. In the latter, her administrator represents her judicially, and in the former he renders his own account, which must be homologated contradictorily with all the creditors of her estate. *Id.*

3. A succession in the possession of the widow and tutrix of the minor children owing debts, must be administered as an entire thing for the advantage of the creditors, as well as beneficiary heirs entitled to the residue after payment of the debts, and the law requires that an administrator shall be appointed in all such cases, who must give security. *Jacobs Tutrix, &c., v. Tricou et al.*, 17, L. R. 104.

4. So a tutrix can not administer a succession in virtue of her office as tutrix of the minor heirs without giving good security, as is required of other administrators. *Id.*

5. In an action to remove an administrator for misconduct or mal administration, it is not necessary, that all the heirs of the estate under administration join in the suit; such removal may be prayed for by any of the heirs. *Kendrick's Heirs v. Kendrick*, 19 L. R. 31.

AFFIDAVIT.

1. An affidavit to sustain an injunction must state positively the facts sworn to, so as to subject the party to the penalties of perjury, if not true. *Le Blanc v. Dashiell*, 14 L. R. 274.

2. An affidavit is not vitiated by setting forth superfluous matters, if it be otherwise good. *Id.*

3. An affidavit, stating that the plaintiff *fears* the defendant may remove the mortgaged slave out of the jurisdiction of the State, is insufficient to obtain an order of sequestration, he should set forth *the facts which induce* his apprehension. *Clark v. Glover et al.*, 14 L. R. 266.

4. An affidavit in which plaintiff states that he verily fears, and has good and sufficient cause to believe the defendant will remove the slaves in contest out of the State, &c., is insufficient to support a writ of sequestration. *Watkinson, agent, &c., v. Black*, 14 L. R. 351.

5. An affidavit in which one of the members swears, that the defendant *is really indebted to the firm*, in the sum claimed, is sufficient to support an attachment. *Parmelee & Baker v. Johnston*, 15 L. R. 429.

6. Where the facts are fully stated in the petition, and the appel-

lant swears that the matters of fact set forth in the petition, are true and correct, it is sufficient to sustain an injunction; for if the facts sworn to are false, the oath would subject the party to the penalties of perjury. *Exchange and Banking Company v. Walden*, 15 L. R. 431.

7. An affidavit for an injunction, which states that the facts contained in the petition are true, is sufficient, if sufficient facts are set out in the petition itself. *Stein v. Gibbons & Irby*, 16 L. R. 103.

8. An affidavit for a trial by jury in an action on a monied obligation, where a plea of compensation and reconvention is set up, is *insufficient* under the act of 20th. March 1839, amending the Code of Practice, when the facts stated do not clearly show they would affect the plaintiff's right of recovery. *Amado v. Breda* 16, L. R. 257.

9. The defendant disproved the facts stated in the affidavit for the attachment, so far as to throw the burden of proof of their verity on the plaintiff; and this not being shown by disinterested witnesses, the attachment was dissolved. *Brumgard v. Anderson*, 16 L. R. 341.

10. When the petition alleges the defendant is taking off his crop, and the affidavit declares all the facts in the petition to be true; that the defendant is reputed insolvent and unable to pay his debts, it is sufficient to support a sequestration of the crop, *Neilson v. Pool*, 17 L. R. 209

11. An affidavit which declares that the facts in the petition stated, as within his knowledge are true, and those not so stated he believes to be true, is insufficient to maintain an injunction; it should be distinctly stated in the petition the facts which are within his knowledge, and those which he has only reason to believe. *Schuber v. Bosgereau*, 17 L. R. 174.

12. It may be shown by affidavit in this court that the matter in dispute exceeds 300 dollars and gives jurisdiction. *Perkins v. Nettles's administrator*, 17 L. R. 253.

13. An affidavit stating that all the material allegations in the foregoing petition are *just and true*, and that the facts are such as in the opinion of the affiant authorize the issue of an injunction, is insufficient to support the injunction. *Boatner v. Walker et al.*, 17 L. R. 461.

14. Where an attorney at law makes affidavit for an attachment, he need not state, that he is attorney in fact. *Austin et al v. Latham*, 19, L. R. 88.

15. An affidavit for a new trial on the ground of newly discovered evidence is insufficient, if it does not state the evidence was not discovered since the trial. *Id.*

AGENCY.

1. Notice of protest to an endorser, who had left the country

with the intention of remaining abroad, served on his agent, will bind the former. *Hestres v. Petrovic and an other*, 1 R. R. 119.

2. Where a vendor, between whom and the defendant no privity exists, sells to the agents of the latter goods known to be for the use of their principal, but looks to such agents exclusively for payment, and after the failure of the latter to pay suffers more than fifteen months to elapse before applying to the principal, during which time he had settled *with his agents*, the principal will not be liable to such vendor. *New Castle Manufacturing Co. v. Red River Rail-road Co.* 1, R. R. 145.

3. In an action for damage to plaintiff's carriage by an omnibus belonging to the defendants, it is not necessary that the plaintiff should prove a legal title in the defendants to the omnibus; *prima facie* evidence of title, such as public reputation, will be sufficient, and for this purpose, a witness may be asked whether the defendants were not generally reputed to be its owners. It will be for the latter to show that they were not. *Hart v. the New Orleans and Carrollton Rail-road Co.*, 1 R. R. 178,

4. A party will be responsible for damage occasioned by negligence or want of skill in a driver, or by the vicious temper of his horses, where the latter belonged to him, or the former was in his employment. *Hart v. the New-Orleans and Carrollton Rail-road Co.*, 1 R. R. 178.

5. The responsibility of a master or employer for the acts of his agents or servants, is not limited to cases where he is present and did not attempt to prevent the act complained of. *Id.*

6. The plaintiffs as agents of the owner of certain notes, deposited them with defendants for collection; the notes were not paid at maturity, nor were they regularly protested, but were subsequently returned to the owner. Plaintiffs considering themselves responsible to the latter, sued defendants in their own names, alleging that the notes were deposited by them as agents of the owner: *held*, that the plaintiffs not having paid the amount of the notes, and their agency having terminated, payment to the plaintiffs would not exonerate the defendants from the claim of the owner. *Hermann and another v. the Union Bank of Louisiana.* 1 R. R. 222.

7. Where the beneficiary heir is not of age, or resides out of the State, another person than his attorney in fact or that of his guardian may be appointed administrator; but the circumstance of the applicant's being such attorney, should not repel him, especially where there is no opposition. *Succession of Mansou.* 1 R. R. 235.

8. Authority to an agent to settle or compromise a debt, does not empower him to bind his principal to defray the costs, and incur the responsibility of collecting notes offered to him in settlement by the debtor. *Dixon v. Ford and another*, 1 R. R. 253.

9. Defendant offered plaintiff's agent certain notes in the settlement of a debt due to his principal, and to guarantee the payment of any portion which could not be collected after suit, on condi-

dition that the latter would advance the expenses and assume the responsibility of their collection, and in the mean time suspend any proceedings against him. Plaintiff refused to assume the expenses and responsibility of collecting the notes, but retained them as collateral security, and sued for the original debt: *held*, that so long as he retained the notes, his right of action would be suspended. *Dixon v. Ford and another*, 1 R. R. 253.

10 Instructions to an agent to invest the proceeds of a bill in a particular way, is an express and special authority to endorse the bill in the name of the principal, such as is required by Art. 2966 of the Civil Code; for the investment could not be made without such endorsement, whether money were to be procured by the sale of the bill, or the bill itself were to be given in payment for the articles in which the investment was to be made. *Swift and others v. Hare and an other*. 1 R. R. 303.

11. No order of seizure and sale can be issued against a party, on an act purporting to be signed by an attorney in fact, where no power of attorney was exhibited, nor any authentic evidence of the subsequent ratification of the act was produced, at the time of applying for such order. An order illegally granted under such circumstances, will be rescinded, though on the trial of a motion to dissolve an injunction obtained against such order, facts should be established, by oral evidence, amounting to a ratification by the principal of the act of the attorney. *Tildon v. Dees, tutrix*, 1 R. R. 407.

12. An unauthorized admission, made by an attorney in fact, will not bind his principal. *Halphen, tutrix, v. Fuselier, administrator*, 1 R. R. 417.

13. A recognition, by the principal, of a deed executed by an agent whose procuration has been lost or mislaid, renders the deed valid *ab initio*; and where it sets forth the tenor of the original conveyance, the production of the latter will be unnecessary. So, where the act of recognition emanates from a public officer, the successor of the one, who, in his official character, was authorized to make the original deed. *Culliver v. Berge & another*, 1 R. R. 427.

14. As a general rule the masters of steamers are authorized to purchase necessary supplies for the use of their boats, and to bind the owners to pay for them; but they have no authority to purchase supplies or merchandize for third persons nor to bind the owners therefor. *Calef & another v. Steamer Bonaparte and owner*, 1 R. R. 463.

15. Mismanagement, or failure to pay over money received, gives no privilege upon the property of an agent. *Whatley v. Austin, administrator*, 1 R. R. 21.

16. Agents or factors of merchants, residing in a foreign country, are personally liable upon all contracts made by them for their employers, whether they describe themselves as agents, or not, in the

contract. In such cases it is presumed that the credit is given exclusively to them, to the exoneration of their employers; but this presumption may be rebutted by proof that the credit was given to both, or to the principal only. *New Castle manufacturing Co. v. Red River Rail Road Co.*, 1 R. R. 145.

17. Where a factor, who has received instructions to pay a debt out of the proceeds of property consigned to him for sale, for the purpose of preventing an attachment, advances the amount and pays the debt before any attachment is levied, his privilege for such advance on the property consigned will be superior to that acquired by a subsequent attachment. *Hundley v. Spencer and another*, 1 R. R. 209.

18. A third person for whom certain articles were ordered, can not be a witness for the defendant in an action against the agent who ordered them. *Leeds and another v. Caldwell and another*, 1 R. R. 256.

19. An agent entitled to a commission for his services, is not disqualified as a witness for his employer. *Burke v. Brazeale and another*, 1 R. R. 73.

20. The power to sell or compromise, must be express and special. C. C. 2966. *Bonneau v. Poydras*, 2 R. R. 1.

21. The dissolution of a partnership is not an act of administration, and therefore, requires a special power. It does not come within the general powers of an agent. C. C. 2966. *Jonau v. Blanchard*, 2 R. R. 513.

22. The same person can not be the agent of two contracting parties in the same transaction, where their interests are in conflict, still less can he act as such, where he has a personal interest in the matter adverse to that of one of the parties. *Florance v. Adams*, 2 R. R. 556.

23. One acting as the agent and on behalf of a partnership, of which he is a member, cannot transfer a note to himself as the agent of a third party. The transfer of a note is a contract, requiring the concurrence of two minds. *Id.*

24. Where an agent whose duty it was to procure insurance for his principal, neglects to do so, he will be responsible for any loss which may result from his neglect. *Strong v. High*, 2 R. R. 103.

25. An agreement between two banks, established in different cities, and acting as agents for each other, "that prompt advice shall be given as well of the acceptance and payment of all remittances, as of protests for non-payment or non-acceptance," will not be considered as contemplating such speedy advice as to enable the party transmitting paper for collection to give notice of protest to endorsers after receiving advice from the party charged with the collection. *Frazier v. New-Orleans Gas Light and Banking Co.*, 2 R. R. 294.

26. An agent is entitled to recover expenses incurred by him in the execution of his agency, even when he has been absolutely un-

successful, unless it be shown that it was the intention of the parties that the principal should pay nothing in case of failure. Otherwise with a broker employed to sell a house, who whether successful or not, is not entitled to recover money spent by him in his agency. *Blanc v. New-Orleans Improvement and Banking Co.*, 2 R. R. 63.

27. A broker is entitled to no compensation, unless a bargain be effected; and even in that event, has no claim for the reimbursement of his expenses. *Didion v. Duralde*, 2. R. R. 163.

28. The claim of a consignee, for advances, is superior to that of an attaching creditor, where the former had received the bill of lading previous to the attachment, but proof of such advances will not defeat the attachment of the latter, who will be entitled to any surplus after payment of the advances and necessary expenses. *Park v. Porter*, 2 R. R. 342.

29. A commission of two and an half per cent for accepting a draft or bill where the drawer has no funds in the hands of the drawee, is a fair compensation for the use of the name and credit of the latter, but where such a commission has been charged, none can be allowed for afterwards paying the draft. *Buckner v. Chapman*, 2 R. R. 360.

30. One who is notified that a contract has been made for him, subject to his ratification, by another pretending to have authority for that purpose, will be presumed to have ratified it, unless he repudiates it immediately after being notified thereof. *Bonneau v. Poydras*. 2 R. R. 1.

31. Defendants advertised for sale, the hull, spars, sails and rigging, of the schooner Louisiana, lying high and dry on a certain island. The advertisement represented that she was well found, her sails unbent, and her running rigging stowed below; that there was some cargo on board, which might entitle the purchaser to an advantageous salvage; and that she was left in the charge of three trusty persons. Plaintiffs purchased, and four days afterwards proceeded to the wreck, which they found at a different place from that advertised, and burnt to the water's edge. *Held*, that if the burning occurred after the day of sale, but before possession could have been taken with reasonable diligence, that defendants were liable, under articles 2443, 2444, for the acts or neglect of the persons they announced as keeping her, and that the delay of four days was not unreasonable. *Bataille v. the Firemen's Insurance Co. of New-Orleans*, 2 R. R. 60.

32. A principal is not bound by the act of an agent who exceeds his authority. *Menefee v. Johnson*, 2 R. R. 274.

33. A bank employing its regularly appointed notary to protest a note deposited with it for collection, will not be liable for his official misconduct or failure to give notice to the endorsers. *Frazier v. New-Orleans Gas Light and Banking Co.*, 2 R. R. 294.

34. The party insured will be responsible for any loss, occa-

sioned by want of proper care on the part of his agents. *Dupeyre v. Western Marine and Fire Insurance Co.*, 2 R. R. 457.

35. The declarations of one who had acted as an agent, made after the termination of his agency are not binding on the principal, though the former be dead at the time of the trial. *Reynolds v. Rowley*, 3 R. R. 201.

36. The joint owners of a plantation are liable each for his virile share for supplies furnished for its use. *Id.*

37. Though the powers of attorney given to the manager of an estate by the joint proprietors, may have been revoked by the death of one, and the marriage of another, yet if he continue to act as such, for the benefit of the joint owners, without any express disavowal of his authority, or if he be subsequently recognized as such, either tacitly or expressly, the proprietors will be bound by his acts. *Reynolds v. Rowley*, 3 R. R. 201.

38. Where it clearly appears that defendant intended to authorize a third person to endorse certain notes in his name, he will be bound by such endorsement though the letter of attorney were received by his agent after the endorsement. The authority, subsequently received, would amount, at least to a ratification of the act of the agent. *Exchange and Banking Co. of New-Orleans v. Boyce*, 3 R. R. 307.

39. Though a receiver, appointed to collect money due to the parties to a suit, have no authority to pay debts due by them, yet if they know that he is doing so, and do not object at the time, they cannot do so afterwards. *Kellar v. Williams*, 3 R. R. 321.

40. Where on the motion of one of the parties to a suit, with the consent of the other, a third person is appointed by the Court to recover and sue for all amounts due to the litigants, on giving bond with security, to hold the amounts so received subject to the order of the Court, he will not be considered an officer of the Court, but the agent of the parties, and only responsible as such. The appointment is the act of the parties. *Kellar v. Williams*, 3 R. R. 321.

41. One acting as an agent, will not be liable, personally, to a party aware that he acts as such. *Hazard v. Lambeth*, 3 R. R. 378.

ALIENS.

1. The capacity of aliens to transmit estates *ab intestato* and to inherit from others in Louisiana is granted, and there is nothing in the laws of this State that excludes aliens from the inheritance of any kind of property. *Duke of Richmond v. Milne's executors et al.*, 17 L. R. 312.

2. The incapacity of aliens by the English and Scotch laws is

only extended to their *holding lands*, or acquiring heritage either by purchase or succession. *Duke of Richmond v. Milne's executors et al.*, 17 L. R. 312.

3. Under the laws of Scotland an alien may acquire property in goods, money and moveable estate; make a will, and sue for personal debts. In England he may be a mortgagee and recover his debt, where there is a positive prohibition against holding lands. *Id.*

AMENDMENT.

1. An amended answer, changing the defence from a contract of *lease* to one of *sale*, may be filed when it is in accordance with the principles settled by the Court, in remanding the case for new proceedings. *Bissel & Ux v. Erwin's heirs*, 13 L. R. 143.

2. So the plaintiff may amend his petition and embrace an act of sale anterior in date to the one sued on; provided it does not *change* the title, but only furnishes additional evidence of it. *Id.*

3. In an action for damages, for slanderous words spoken and uttered publicly, by the defendant, concerning the plaintiff, the latter may amend his petition by adding an allegation of the *falsity* of the charges, and *malice* on the part of the defendant in making them; but he must pay all the costs up to the time of the amendment. *Mitreau v. Delassize*, 13 L. R. 416.

4. An amendment in a supplemental petition, which changes the original demand from a personal action against the *endorsers* of a note to a real action against one of them, to make the property liable for which the note was given, is *inadmissible*, as changing the substance or nature of the issue joined. *Petitpain v. Frey et al.*, 15 L. R. 195.

5. One of the tests for ascertaining whether the substance of a demand be changed by amending the pleadings, is to see if the matters set forth in the two demands could have been cumulated in one action or petition. *Id.*

6. Two inconsistent demands, exclusive of each other, cannot be cumulated in the same suit: so the defendant cannot be sued as endorser, and as the illegal possessor of the property for which the note was given, claimed under the vendor's privilege. *Id.*

7. Any objection to the amendment of a judgment, on the ground that the answer of appellee requesting it, was not filed three days before that fixed for the trial, as required by art. 890 of the Code of Practice, will be considered to have been waived, where the case was fixed by the appellant before the expiration of the three days allowed for filing the answer. *Griffing, administratrix v. Caldwell and others*, 1 R. R. 15.

8. A petition may be amended so as to change the action from

a possessory to a petitory one. *Hoover, tutor, v. Richards and wife*, 1 R. R. 34.

9. A supplemental petition containing no new allegations, and filed for the sole purpose of propounding interrogatories, to which the defendant has neglected to answer after sufficient time, may be withdrawn, by leave of the Court, after the case has been called for trial. *Mackin and others v. Rowly*, 1 R. R. 82.

10. Where a petition has been addressed, by mistake, to a tribunal different from that in which it was filed, the error will be fatal. No judgment by default can be taken, nor can permission be given to amend. *Wadsworth v. Harrison and others*, 1 R. R. 96.

11. The answer can not be amended after the case has been called for trial. *Duval v. Kellam*, 1 R. R. 58.

12. A jury may be prayed for in a supplemental answer; but it will be in the discretion of the Court to permit such answer to be filed. It will be properly rejected where the jurors, summoned for the term, have been discharged, and allowing a jury would delay the trial a whole term. *Landry v. Gamet*, 1 R. R. 362.

13. A supplemental answer, filed without leave of the Court, or of the plaintiff will be disregarded. *Callaway v. Webster*, 1 R. R. 553.

14. Any attempt to amend a bill of exceptions, after judgment signed, is wholly irregular. *Police jury of Pointe Coupée v. Gardiner*, 2 R. R. 139.

15. Plaintiff can not amend his petition so as to change his claim for the price of certain slaves, into an action for damages for defendant's failure to give them up in compliance with his contract. C. P. 419. *Menefee v. Johnson*, 2 R. R. 274.

16. A prayer for a jury is too late after the case has been set for trial. *Id.*

17. A prayer for the amendment of a judgment must be made when the answer to the appeal is filed. It will be too late, when the case is fixed for trial. *McGuire v. Bry*, 3 R. R. 196.

18. An amended petition propounding interrogatories to a party to the action offered after the trial has commenced, will be too late. *Dabbs v. Hemken*, 3 R. R. 123.

19. As a general rule, amendments should be admitted where the justice of the case will be promoted thereby, but they must be presented before going to trial. The case must be an extraordinary one, to justify the reception of an amendment after the trial has commenced; and the amendment must not be calculated to produce delay. *Id.*

20. A defendant will not be permitted, by shifting his grounds of defence, to contradict, by an amended answer, facts stated and admissions made by him in his original answer. *Estill v. Holmes*, 3 R. R. 134.

21. Action by the payee on a promissary note. Defendant answered, pleading a failure of consideration, and alleging that

the note was given in error, for the price of a tract of land purchased by plaintiff from a person to whom defendant had previously sold it. In an amended answer, filed at a subsequent term, he averred, that the note was executed for the price of a tract of land belonging to the United States, to which plaintiff pretended to have a pre-emption right; and which he bound himself to convey by a good title to defendant; the plaintiff had no pre-emption right to the land; and that the United States had sold the land to a third person, which sale had come to defendant's knowledge, since the last term of the Court. The sale by the United States was established. *Held*, that defendant could not be allowed to gain say the admissions originally made by him, and that he must be estopped by his warranty, as vendor, for praying for a rescission on the ground of want of title in the plaintiff. Judgment in favor of the latter. *Estill v. Holmes*, 3 R. R. 134.

ANSWERS TO INTERROGATORIES.

1. When a party expressly calls for the separate answers of each member of the firm, every member thereof is bound to answer when notified of the order of Court; and without a commission being sent, even when the party interrogated resides out of the parish. *Allain & Trémoulet v. Truxillo*, 14 L. R. 297.

2. It devolves on the party desiring the answers to interrogatories, to notify the party interrogated, and give time for answers to be made. *Id.*

3. Where separate answers of the members of a firm are required to interrogatories, each member is bound to answer separately when notified. *Same v. same*, 14 L. R. 300.

APPEAL.

1. A certiorari will be refused on an appeal, if it appears it is not in the power of the clerk to supply the defect in the record, from documents in his office. *Beard et al. v. Poydras*, 13 L. R. 82.

2. If it appears the appellant has been without fault, and prevented by acts of the adverse party from bringing up a complete record, the Court may, in its discretion, send the case back for a new trial. *Id.*

3. When there is an agreement in the record, that the case shall be tried first between the original parties, the warrantors need not be made parties to the appeal. *Id.*

4. When the record is incomplete, the appeal may still be set

down for argument on a bill of exception, or errors apparent on the face of the record. *Beard et al v. Poydras*, 13 L. R. 82.

5. This appeal was considered as taken for the purposes of vexation and delay alone; and the judgment is affirmed with the maximum of damages as for a frivolous appeal. *Nichols et al. v. Nichols*, 13 L. R. 291.

6. No appeal lies from an order of Court dismissing a supplemental petition. *Geordano v. Thomas et al.*, 13 L. R. 315.

7. Where the appellee prays to have judgment so amended, as to give him ten per cent damages on a protested bill of exchange, he can not have damages for a frivolous appeal. *Parmely et al. v. Bradbury*, 13 L. R. 351.

8. No appeal lies from an order of Court, recognizing a creditor of an insolvent, to be a *mortgage creditor*, and paid by preference as such. *Pavageau f. m. c. v. his creditors*, 13 L. R. 354.

9. There being no grounds on which to support the appeal, judgment is affirmed, with damages as for a frivolous appeal. *Darramon v. Follin et al.*, 13 L. R. 426.

10. Judgment affirmed; and although the appeal was frivolous, as no damages were prayed for, none were allowed. *Bogart et al. v. Drake et al.*, 13 L. R. 427.

11. The Supreme Court is empowered to condemn the appellant to pay damages for a frivolous appeal, if the appellee claims it, not exceeding ten per cent on the amount in dispute, including interest. *McCoy's executors v. Pritchard et al.*, 13 L. R. 428.

12. The party praying a *suspensive* appeal must within ten days after the notification of the judgment, give his obligation with a *good and solvent* surety, residing in the jurisdiction of the Court, for the sum required by law. *State v. Judge Buchanan*, 13 L. R. 574.

13. The appellant must offer to the Judge *a quo*, a good and sufficient surety, and the judge is bound to receive the security offered; but if he is shown to be insufficient, the condition has not been complied with through the fault of the appellant, and the appellee is entitled to his execution. *Id.*

14. So, if the surety in a suspensive appeal bond is shown to be insufficient, the appellee may have his execution immediately. *Id.*

15. No appeal lies from a judgment overruling an exception to the jurisdiction of the Court. *Richardson v. Ledbetter*, 14 L. R. 156.

16. Where the record was not filed on the return day, nor within three judicial days thereafter, the Court refused to sustain the appeal, urged on the ground that the delay was caused by mistake of the appellant and his counsel, in supposing it had been filed by the clerk in proper time. *Gill v. Hudson*, 14 L. R. 203.

17. An appeal lies from an interlocutory judgment setting aside a writ of sequestration. *Gossett v. Cashell*, 14 L. R. 245.

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in this case, it was considered as taken for delay, and judgment confirmed with ten per cent damages. *Brumfield v. Mortee*, 14 L. R. 261.

19. When the dilatory proceedings in the Court below, coupled with the absence of any defence, as set up, show that an appeal is resorted to for delay, the judgment will be affirmed, with ten per cent damages. *Brumfield v. Mortee*, 14 L. R. 263.

20. Where the record is brought up by the appellee, and there does not appear to have been any valid defence, the appeal will be considered as taken for delay, and the judgment affirmed with ten per cent damages. *Same v. Cunningham*, 14 L. R. 264.

21. The certificate of the clerk should state that the record "contains all the evidence adduced on the trial" or the appeal will be dismissed. *Choice v. Harby et al.*, 14 L. R. 265.

22. Where the appellee asks to have the judgment amended, he cannot have damages as for a frivolous appeal. *Le Blanc v. Dashiell*, 14 L. R. 274.

23. It must appear from evidence before this Court, that the appellee resides out of the State, at the time of service of citation, on his attorney, or it will be insufficient. *Ratliff v. his creditors*, 14 L. R. 292.

24. An appeal having been once granted, the judge *a quo* has no longer any control, and cannot make any order respecting a citation or the mode of serving it. *Id.*

25. An appeal is not to be dismissed according to the act of March 20, 1839, if the irregularity of the citation, or service thereof, is not imputable to the fault of the appellant; otherwise if it is. *Id.*

26. There was no ground to expect relief on appeal, and the judgment was affirmed, with ten per cent damages. *Paulding v. Parker*, 14 L. R. 324.

27. The appeal taken for delay and judgment affirmed, with ten per cent damages. *Robinson & Co. v. Armstrong*, 14 L. R. 325.

28. Appeal evidently for delay, and judgment affirmed with ten per cent damages. *Diggs v. McHenry*, 14 L. R. 326.

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34. Where the defendant offers no evidence in support of his pleas, and shows nothing to support his appeal, judgment will be affirmed with the maximum of damages. *Irwin et al. v. Steamer Kentuckian*, 14 L. R. 466.

35. A party cannot be allowed to appeal from a judgment confessed by him, or in which he has acquiesced by executing it voluntarily; neither can he have such judgment amended on the appeal of the adverse party. *Williams v. Duer*, 14 L. R. 523.

36. The constitutional right to appeal in all cases over three hundred dollars, must be exercised with such restrictions as the rights of others may render necessary. *Davis v. Jonti*, 14 L. R. 95.

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49. Appeal frivolous and judgment affirmed with the maximum of

damages. *Northern Bank of Kentucky v. Edwards et al.*, 15 L. R. 32.

50. Appeal for delay, and judgment affirmed with five per cent damages. *Hubbell v. Locke et al.*, 15 L. R. 37.

51. Where one of the appellants died after the appeal is taken, and the other does not file the record on the return day, or within the legal delay; and in the mean time the appellee obtains the clerk's certificate, the Court will forbear to dismiss the appeal under the act of the 20th March, 1839, or to impute the fault to the appellant. *Winchester v. Ory's syndics*, 15 L. R. 104.

52. Where the appeal is devolutive only, and no amicable demand proved, damages will not be given as for a frivolous appeal. *Tiernan et al. v. Noé*, 15 L. R. 119.

53. Where the appellee resides in any of the parishes of this State, service of citation must be made *personally*, or at his domicile; otherwise the appeal will be dismissed. *Shirley v. Fabrique*, 15 L. R. 140.

54. Appeal dismissed for want of a statement of facts, bill of exceptions, &c., to enable the Court to examine the case on the merits. *Bogereau v. Armstrong*, 15 L. R. 144.

55. No appeal lies from proceedings had on a writ of habeas corpus in a criminal case, or for detention in disobedience to police regulations, and the like cases. *State v. Judge of Commercial Court*, 15 L. R. 192.

56. Where the certificate of the clerk states, that the record contains all the evidence, except the plan of the *locus in quo*, the appeal will be dismissed, when there is no bill of exceptions or assignment of error. *Ogilvie v. Faure*, 15 L. R. 191.

57. Appellees non cited, and the record not containing all the evidence, the appeal was dismissed. *Delery et ux v. Savenat et al.*, 15 L. R. 214.

58. A frivolous appeal and judgment affirmed with ten per cent damages. *McKean v. Chase*, 15 L. R. 217.

59. Appeal frivolous and damages given as a delay case. *Peschier v. Huie*, 15 L. R. 222.

60. The party wishing to appeal and have the judgment of the inferior Court revised, must see that the evidence is taken down in writing, or a statement of facts made out, otherwise the judgment will be affirmed with damages. *Johnson et al. v. Spearing*, 15 L. R. 232.

61. Appeal taken for delay, and judgment affirmed with the maximum of damages. *Florance v. Vaurigaud et al.*, 15 L. R. 255.

62. Frivolous appeal and judgment affirmed with the maximum of damages. *Ashhurst et al. v. Adams et al.*, 15 L. R. 288.

63. Where the appellee has the judgment corrected in part, it may be affirmed, with costs, as for such parts as are not altered. *Parkhill v. Caldwell*, 15 L. R. 352.

64. The appellee cannot have damages as for a frivolous appeal,

when he has the judgment corrected, even in part, by himself. *Parkhill v. Caldwell*, 15 L. R. 352.

65. All the intervening parties to a suit having an interest in the judgment, must be made parties to the appeal or it will be dismissed. *Kellog et al. v. Clarke*, 15 L. R. 362.

66. Appeal dismissed, because there was neither statement of facts, bill of exception or assignment of errors, to enable the Court to try the case on its merits. *Bliher v. Howell and Johnson*, 15 L. R. 368.

67. The inferior Court has no longer any power over an appeal, after it has been once granted. The Supreme Court alone has jurisdiction over the case, when an appeal is once taken. *Alling et al. v. Beamis*, 15 L. R. 385.

68. In this case, the points relied on in the defence are untenable and the appeal frivolous. Judgment affirmed with five per cent damages, and bearing five per cent interest. *Lanusse v. Frederick et al.*, 15 L. R. 418.

69. Where the appeal is brought up without the evidence having been reduced to writing, and no error is assigned, it will be considered as a delay case, and the judgment affirmed with the maximum of damages. *Trier v. Holmes*, 15 L. R. 435.

70. Appeal for delay and judgment affirmed *without* damages, as none were asked. *Hall v. Gaiennié*, 15 L. R. 439.

71. Appeal for delay and judgment affirmed with the maximum of damages. *Gibson & Co. v. Andler et al.*, 15 L. R. 440.

72. Judgment drawing five per cent interest affirmed with five per cent damages as for a frivolous appeal. *Widds & Co. v. Barrett & Co.*, 15 L. R. 445.

73. Damages will not be allowed as for a frivolous appeal, where it appears there has been no amicable demand, and the want of it is specially pleaded. *Bennet v. Crocker et al.*, *f. p. c.*, 15 L. R. 441.

74. Judgment affirmed with ten per cent damages, as for a frivolous appeal. *Gibson & Co. v. J. and J. Bellow*, 15 L. R. 442.

75. Appeal dismissed, for want of all the evidence to try the case on its merits. *Kirkman et al. v. Pollit & Thorn*, 15 L. R. 442.

76. Appeal for delay and judgment affirmed with the maximum of damages. *Parkhill v. Locke et al.*, 15 L. R. 443.

77. Frivolous appeal and judgment affirmed with the maximum of damages. *Nelson v. Clayton*, 15 L. R. 444.

78. There is no appeal from a judgment by consent. *Brand v. Jones*, 15 L. R. 449.

79. An appeal lies from an order or judgment, authorizing the plaintiff to bond goods or property of the defendant, which has been sequestered. *Comstock et al. v. Paie*, 15 L. R. 481.

80. The Court will not dismiss an appeal for an imperfection of the record; but continue the cause for reasonable time, to have the record perfected. *Childress v. Allins et al.*, 15 L. R. 500.

81. An appeal lies from an order or judgment on a rule discharg-

ing a debtor from arrest and imprisonment, under an act abolishing imprisonment for debt. *State of Louisiana v. Judge of the Parish Court*, 15 L. R. 531.

82. Where the appellant fails to cause citation to issue, he will not be entitled to relief under the 19th section of the act of March 20, 1839, amending the Code of Practice; but in such cases the appeal will be dismissed. *Walker et al. v. Martolo*, 16 L. R. 50.

83. All persons appealing and seeking to reverse a judgment, must bring before this Court every party who has an interest in having it sustained. *Cox v. Rees et al.*, 16 L. R. 109.

84. So where a rule was taken on the clerk to compel him to issue an execution in a particular form, and he refused, no appeal lies *against him alone* from a judgment sustaining his course and discharging the rule. The clerk has no interest in sustaining such a judgment. *Id.*

85. Either party may have the testimony offered in Court taken down by the clerk. The judge has no authority to do this, even at the request of the parties, when the Court has a clerk, except in a case where the party intending to appeal, fails in getting the opposite party to make a statement of facts, then the testimony taken down by him in writing will serve as a statement of facts. *Le Blanc v. Broussard's heirs*, 16 L. R. 137.

86. A statement of facts must be procured by the party *intending* to appeal, necessarily, before the appeal is granted. *Id.*

87. An appellant neglecting to have a statement of facts made out, when the testimony is not taken down by the clerk before the appeal is granted, cannot claim any relief from this Court. *Id.*

88. In Courts of general jurisdiction, the party intending to appeal must have the testimony taken down *in writing by the clerk*, so that the record contains all the evidence adduced on the trial, or the appeal will be dismissed. *Tompkins et ux v. Benjamin, tutor*, 16 L. R. 197.

89. The Judge of the Court of Probates is required by the article 1042 of the Code of Practice, to take down the testimony of witnesses in writing and annex it to the record, together with a list of the documents produced by the parties, that they may be read on the appeal. *Id.*

90. So, where the Judge of Probates failed or neglected to take down the testimony of the witnesses on the trial, and the appeal brought up without it, the cause will be remanded for a new trial. *Id.*

91. A statement of facts must be procured by the party intending to appeal, and it is sufficient if it be made out at any time before granting the appeal. *Union Bank v. Williams et al.*, 16 L. R. 236.

92. Where a statement of facts was so imperfect as to preclude an examination of the case on its merits, the appeal was dismissed. *Id.*

93. Appeal dismissed for want of proper parties. *Lynch et al. v. Brewer*, 16 L. R. 247.

94. Appeal frivolous and for delay, and judgment affirmed with the maximum of damages. *Mahle v. Terry*, 16 L. R. 248.

95. When the appeal is for delay damages will be allowed. *Coleman et al. v. Flint*, 16 L. R. 250.

96. Judgment affirmed with the maximum of damages, as for a frivolous appeal. *Manice v. Long*, 16 L. R. 263.

97. A show of defence will not alone protect the appellant from damages as for a frivolous appeal. *Delinifico & Co. v. Terry*, 16 L. R. 269.

98. There being no bill of exception or statement of facts, and the record not containing all the evidence the appeal was dismissed. *State of Louisiana v. Cook*, 16 L. R. 287.

99. Where the appeal is not brought up in such a manner as to enable the Court to examine the case on any point, it will be dismissed. *Latour v. Bellow*, 16 L. R. 562.

100. Judgment bearing ten per cent interest, affirmed with five per cent damages as a delay case. *Gollain v. Jamet*, 16 L. R. 565.

101. Where the defendant waives delay and submits the case readily for decision, the damages for a frivolous appeal will be mitigated and reduced. *Opdyke v. Corles*, 16 L. R. 569.

102. Under the act of 20th March, 1839, "amending the Code of Practice" errors and irregularities in taking up an appeal will be cured by allowing time when not occasioned by the fault of the appellant. *Dèsorme's heirs v. Dèsorme's syndic*, 17 L. R. 111.

103. The 1042 article of the Code of Practice directs the testimony of witnesses in causes tried before the Court of Probates to be taken down in writing by the judge, and annexed to the record; also a list of the documents filed by the parties, that they may be read on the appeal, and when this is not done, the case will be remanded at cost of the appellee. *Id.*

104. The act of March 20th, 1839, section 19, forbids the dismissal of appeals on the ground of not being made returnable to the next term, when it does not appear the fault or neglect was imputable to the appellant. *Perkins v. Nettle's administrators*, 17 L. R. 253.

105. When judges are required by law to *alternate* in holding Courts in their Districts, either may grant an appeal from a judgment of the other. *Id.*

106. But where one of several defendants in a judgment of partition appeals, he must make all his co-defendants appellees or parties, as well as the plaintiff, or the appeal will be dismissed. *Farrar v. Newport et al.*, 17 L. R. 346.

107. No appeal lies from a decision of the Court referring a case of boundary back to the surveyors appointed, with instructions to

search for and run out a particular boundary line referred to. *Zeringue v. Harang's administrator*, 17 L. R. 349.

108. Appeal dismissed; the certificate of the clerk not stating that the record contained all the evidence adduced on the trial. *Marsh v. Barnes & Tilghman*, 17 L. R. 27.

109. There was a judgment by default and no attempt to show error on the appeal: judgment was affirmed with damages as a delay case. *Avart v. Banks*, 17 L. R. 69.

110. Appeal taken to a return day which is changed by law to a more distant day, and the record is not filed on the first, but on the last return day, it will not be considered as abandoned but as filed in proper time. *Reynolds, Byrne & Co. v. Feliciana Steam boat Company*, 17 L. R. 397.

111. A suspensive appeal does not lie from a judgment removing a tutor and appointing another in his place, as the minor would be without a protector during the pendency of the appeal. *State v. Judge of Probates of New-Orleans*, 17 L. R. 432.

112. A motion to dismiss, after an appeal has been pending more than three years, and since the passage of the act of 1839, comes too late and will be overruled, to allow further time to correct all errors. *Police Jury of St. Helena v. Fluker administrator*, 17 L. R. 465.

113. When none of the errors in bringing up an appeal are imputable to the appellant, he will be allowed further time to correct such errors. *Id.*

114. Where ample time is allowed to make the necessary party, on a suggestion of the death of the original defendant, and no steps are taken the appeal will be dismissed. *Bell to use of McMicken v. Mix, administrator*, 17 L. R. 467.

115. A return that an appellee "was absent from the State," is insufficient to authorize service on the attorney; non constat, that his absence was temporary or permanent. *Comstock et al. v. Paie & Smith*, 17 L. R. 515.

116. Irregularities in service of citation do not authorize the dismissal of the appeal. *Id.*

117. When an appeal appears to be taken solely for delay, judgment will be affirmed with the maximum of damages. *Cantrelle et al. v. Percy*, 17 L. R. 520.

118. Where a party at the suggestion of the Court submits to a non suit, on a tender allowing him the faculty to have it set a side, if he is aggrieved by the decision, refusing to set it a side, he can appeal. *Foley v. Dufour et al.*, 17 L. R. 521.

119. Where due notice of a protest was given to the defendant, who is sued as endorser, the appeal will be considered as only for delay, and the judgment affirmed with the maximum of damages. *Pritchard v. Forgay*, 17 L. R. 585.

120. An appeal lies from the appointment of a dative testamentary executor by the Judge of Probates; also from the appointment

of syndics and curators of vacant estates. *State v. Judge of Probates of New Orleans*, 18 L. R. 392.

121. Damages for a frivolous appeal cannot be allowed when the dismissal of the appeal is insisted on by the appellee. *Allen v. Arnouil*, 18 L. R. 437.

122. The appeal will be dismissed when the record is incomplete and contains nothing for the Court to act on. *Id.*

123. The appellant from a judgment dissolving an injunction obtained against an order of seizure and sale, cannot take a suspensive appeal without giving security as in other cases of such appeals; security for costs is not sufficient. *State v. Judge of the Third District*, 18 L. R. 444.

124. The article 740 of the Code of Practice is an exception to the rule, requiring security in obtaining an injunction to stay an order of seizure and sale, but only applies to that class of cases. *Id.*

125. Damages for a frivolous appeal will not be given where it does not appear that the party has suffered any from the delay. *McCabe v. Gentes*, 18 L. R. 31.

126. An appeal from a judgment not signed will be dismissed. *Tissott et al. v. Bowles*, 18 L. R. 30.

127. Appeal solely for delay and judgment affirmed with the maximum of damages. *Verret et al. v. Clavé*, 18 L. R. 36.

128. Appeal dismissed for want of the means to examine the case on its merits. *Totten v. Merrifield*, 18 L. R. 583.

129. The damages allowed by law to the appellee for a frivolous appeal or one evidently taken for delay, will not be given, unless they are claimed in the answer to the appeal. *Lee & Hardy v. Palmer et al.*, 19 L. R. 25.

130. The appeal will be dismissed when there is nothing by which the judgment below can be tested. *Healy v. Wagners*, 19 L. R. 91.

131. When an appeal is not clearly suspensive, it will not be dismissed on the ground of insufficiency in the amount of the bond, when it covers costs. *McKown v. Mathes*, 19 L. R. 542.

132. The signature of the parties to a blanc appeal bond, is binding on them and may be filed up afterwards, to operate a suspensive appeal. *State of Louisiana v. Judge of the 1st District*, 19 L. R. 174.

133. When a suspensive appeal is once granted and bond signed accordingly, the jurisdiction of the judge *a quo* is at an end, after ascertaining the security is good. *State of Louisiana v. Judge of the 1st District*, 19 L. R. 174.

134. Appeal for delay and final judgment affirmed with the maximum of damages. *Pumphrey v. Prescott et al.*, 19 L. R. 345.

135. An appeal will not be dismissed for want of citation of appeal, when it was caused by the appellee. *Anderson's administrators v. Birdsall's administratrix*, 19 L. R. 441.

136. A judgment in a suit against an administrator, ordering a claim against the succession to be paid with privilege, though the question of privilege may have to be settled afterwards, contradictorily with the rest of the creditors, is final as to the administrator and may be appealed from by him. *Whatley v. Austin administrator*, 1 R. R. 21.

137. No appeal will lie from a demand for three hundred dollars, with interest from judicial demand. *Klady v. McGuire*, 1 R. R. 25.

138. No appeal will lie from a demand which does not exceed three hundred dollars at the institution of the suit. *Klady v. McGuire*, 1 R. R. 26.

139. Plaintiff holding a mortgage for five thousand dollars on a lot of ground, prayed for an injunction to prevent defendant from selling certain improvements erected on the lot separately from the lot itself, for two hundred and ninety dollars damages and for general relief. *Held*, that his claim was for damages in addition to the relief sought by preventing the illegal sale of the improvements on the lot on which he had a mortgage, and that the limitations of the damages to a sum less than three hundred dollars, could not prevent his right to appeal. *McDonough v. Leroy*, 1 R. R. 173.

140. No appeal will lie from a judgment on a rule to show cause why an attachment should not be set aside; the judgment is an interlocutory one, works no irreparable injury, and may be corrected, if erroneous, by appeal from the final judgment. *Hart v. Philipps*, 1 R. R. 223.

141. The syndics of the creditors of an insolvent cannot appeal from a judgment, establishing the privileges of the creditors with regard to each other. The estate is not aggrieved by such a judgment; it affects only the individual rights of the creditors. *Kohn syndic and others v. Wagner and another*, 1 R. R. 275.

142. An appeal will lie from a judgment of a Court of Probates ordering the partition of the property of the succession, where the judgment does not direct in what manner the partition is to be made, nor appoints any notary to make it. Such judgment may be appealed from as a final one, because no further proceedings can take place under it. *McCollum and husband v. Palmer and others*, 1 R. R. 512.

143. An appeal by a married woman, from a judgment rendered against her, taken in her name alone, and without being authorized by her husband or the Court, will be dismissed. *Gorman v. Berghans*, 1 R. R. 230.

144. The authorization to enable a married woman to appeal from a judgment rendered against her, must be proved by other evidence than the allegation of the wife, or of her counsel. *Gorman v. Berghans*, 1 R. R. 468.

145. A & B sue as heirs, and judgment in favor of A, defendant alone appeals, alleging in his petition that he complains only

of so much of the judgment as was in favor of A. On the trial of the appeal B intervened. *Held*, that not having appealed, he cannot interfere without the consent of the defendant; and that so much of the judgment only as was in favor of A, is before the Court. *Kemp and others v. Womack*, 1 R. R. 369.

146. Where in an action against the drawer and accomodation endorsers of a bill, there was judgment for plaintiff against the drawer for a part of the amount claimed, but against the plaintiff as to the endorsers, and he appealed from so much of the judgment as was in favor of the latter, without making the drawer a party to the appeal. *Held*, that as the drawer is not a party, the amount of the judgment cannot be changed as to her, nor encreased as to the endorsers, who must be viewed as her sureties, and cannot be made liable for a larger sum than the principal debtor. *Tenney v. Russell and others*, 1 R. R. 449.

147. The period after the lapse of which no appeal will lie, is to be computed from the day when the judgment was rendered; not from that on which it was notified to the party against whom it was given. *Lazarre v. Snow*, 1 R. R. 60.

148. Where in consequence of the want of sufficient time between the day on which an appeal was allowed and that on which it was made returnable, no bond was given, or citation issued, or other steps taken to prosecute the appeal, it will not be considered such an abandonment of the right as to preclude a second appeal. *Prentice v. Chewning*, 1 R. R. 71.

149. Joining in the sale, and signing the sheriff's deed for property sold under a *fiери facias*, does not amount to such an acquiescence in the judgment, or voluntary execution of it, as will deprive the party of the right to appeal. It would amount, at most, to the waiver of a monition so far as he was concerned. *Id.*

150. Where the appellant fails to take the necessary steps to prosecute his appeal, he will be considered as having abandoned it, in the sense of article 594 of the Code of Practice; and will not be allowed to renew it. *Aliter*, when the appeal is dismissed on motion of the appellee. In the latter case, it may be renewed at any time within the delay fixed by law. *Roberts v. Benton* (1st case), 1 R. R. 100.

151. A sale of property under execution on a judgment from which no suspensive appeal has been taken, will divest the title of the owner, though the judgment be afterwards reversed. *Williams v. Gallien*, 1 R. R. 94.

152. Where an appeal has been taken, and bond and security given according to law, the inferior Court has no further cognizance of the case, than to send up the record. *Portier v. Harman and another, re-hearing*, 1 R. R. 527.

153. A remission in the Court below, of the amount of damages allowed by the jury, will stop the party from setting up any

claim for damages in the appellate Court. *Kemp and others v. Womack*, 1 R. R. 369.

154. Where the bond given by an executor, on an appeal from a judgment rendered against him by a Court of Probate on the opposition of the heirs, purports to be executed in favor of the heirs only, but was intended in reality for the benefit of all entitled to receive any part of the assets in his hands, and whose right to enforce payment was suspended by the appeal, it will enure to the benefit of all. *Succession of Roboam*, 1 R. R. 258.

155. Art. 574 of the Code of Practice, which provides that the judge, on granting an appeal, shall state at the foot of the petition the amount of the security to be given by the appellant, relates only to devolutive appeals. In suspensive appeals the amount is fixed by the Code, at a sum exceeding by one half the amount of the judgment. *Duperron v. Van Wickle, Sheriff and others*, 1 R. R. 324.

156. Judgment for three hundred and fifty dollars; the Judge on granting an appeal fixed the amount of the bond at five hundred and fifty dollars; appeal bond executed for one hundred and fifty dollars only. Appeal dismissed, on the ground that the bond was insufficient for a suspensive appeal, being for less than half the judgment, or for a devolutive appeal, being for a sum less than was fixed by the judge. *Id.*

157. Judgment for a certain sum, with damages at twenty per cent a year, from a period anterior to the judgment, till paid. *Held*, that to obtain a suspensive appeal, the bond must exceed by one half the amount of the judgment, including the damages which had accrued at the time it was rendered. *Roman, governor, for the the use, etc., v. Peters and others*, 1 R. R. 522.

158. Where the certificate of the clerk shows that parol testimony, taken on the trial, but not reduced to writing, is not to be found in the record, and there is no statement of facts, the appellant cannot be relieved by a *certiorari*, as it appears from the certificate of the clerk that he cannot send up the evidence, and the appeal must be dismissed. *Roberts v. Benton, 2d. case*, 1 R. R. 100.

159. The appeal will be dismissed, where the certificate of the clerk shows, that the record does not contain the parol evidence adduced on the trial, and that such evidence was not reduced to writing, and there is no statement of facts, bill of exceptions, nor assignment of errors. *Dorsey v. Harding, sheriff and another*, 1 R. R. 132. *Bell v. Morrison*, 1 R. R. 543.

160. Where the record contains neither statement of facts, bill of exceptions, nor certificate that it contains all the evidence adduced below, and there is no assignment of errors the appeal must be dismissed. *Young v. Alpuenté* 1 R. R. 196.

161. A judgment will not be reversed on an assignment of error, where such error might have been cured by evidence legally

admitted. *Harris for the use etc. v. Alexander and another*, 1 R. R. 30.

162. An assignment of errors may be filed at any time within ten days after the record is brought up, where the case has not in the meantime been fixed for trial, but when by agreement, tacite or otherwise, the case has been fixed before the expiration of the ten days, such assignment must be filed in time to give the opposite counsel an opportunity of knowing what he has to contend against; and one day at least, should be allowed for this purpose. *Dorsey v. Harding, sheriff, and another*, 1 R. R. 132.

163. Where the record contains no statement of facts, nor any thing equivalent thereto, nor exception to the opinion of the judge, nor special verdict, and the appellant relies alone on errors of law apparent on the face of the record, an assignment stating specially such errors, must be filed within ten days after the record is brought up, or the appeal will be dismissed. *Ward and others v. Armistead and another*, 1 R. R. 460.

164. Any objection to the amendment of a judgment, on the ground that the answer of appellee requesting it, was not filed three days before that fixed for the trial, as required by art. 890 of the Code of Practice, will be considered to have been waived, where the case was fixed by the appellant before the expiration of the three days allowed for filing the answer. *Griffing, administratrix v. Caldwell and others*, 1 R. R. 18.

165. Where the appellee has joined issue on the merits, it will amount to a waiver of any objection on account of want of citation, or the insufficiency of the appeal bond, and where such objections have been thus waived by parties cited in warranty, their warrantee cannot set them up. *Carmichael and others v. Armor*, 1 R. R. 197.

166. The verdict of a jury will not be disturbed, where it does not appear that the judge, from whom a new trial was asked, erred in refusing it. *Mason v. Louisiana State Marine and Fire Insurance Co.*, 1 R. R. 192.

167. The verdict of a jury on a question of fact, will not be disturbed unless clearly wrong. *Caldwell v. Cogswell and others*, 1 R. R. 554.

168. Where the signature to a power of attorney was proved by a witness who was sworn without objection, it will be too late to object on an appeal that the subscribing witness should have been produced. *Cawthorn v. W. N. T. McDonald*, 1 R. R. 55.

169. On a question whether due diligence has been used, the decision of the judge below will not be interfered with, unless clearly erroneous. *Knight v. Murchison*, 1 R. R. 31.

170. Where it is not certified that the record contains all the evidence adduced on the trial, and the judgment purports to have been rendered on due proof of the plaintiff's demand, it will be presumed that evidence was offered to satisfy the Court, though

the record does not otherwise show that any was produced. *Fowler v. Smith & Husband*, 1 R. R. 448.

171. In an action for the partition of the property of a succession, no claim can be allowed by the appellate Court, which was not made before the Court of Probate, nor decided on by that tribunal. *Griffin, tutor, v. Waters*, 1 R. R. 149.

172. Damages will not be allowed, where the appellee prays for and obtains an amendment of the judgment. *Lay v. Irwin*, 1 R. R. 121.

173. Damages for a frivolous appeal cannot be granted by the Court, where they have not been asked for by the appellee. *Thayer v. Little John and others*, 1 R. R. 140. *Aikin and others v. Free-land and others*, 1 R. R. 573.

174. Where the attention of the Court has not been drawn to a bill of exceptions in the record, either by the points filed, or on the first hearing of the case it will not be noticed on a re-hearing, *Petitpain v. Palmer and husband, on a re-hearing*, 1 R. R. 221.

175. An order, to deliver to the consignee property seized by attachment, on a vessel in which it had been shipped for the purpose of being sent out of the State for sale, on his executing bond, with security, to abide the judgment of the Court, is final as to the possession of the property, and may be appealed from. *Park v. Porter*, 2 R. R. 342.

176. A judgment may be so far final as to be subject to appeal, without being final as to the point at issue. *Id.*

177. To entitle a party to an appeal from an interlocutory judgment, it is not necessary that the injury be absolutely irreparable; it is sufficient that it may become irreparable in consequence of the final action of the Court. *Id.*

178. No appeal suspensive or devolutive, will lie from a judgment, rendered in the progress of a suit by the wife against her husband to recover the administration and possession of her paraphernal property which had been sequestered on the execution of a bond with security, ordering her to be put in possession of the sequestered property, or from one overruling a motion to set aside the sequestration. They are interlocutory judgments, from which no appeal will lie unless they work irreparable injury. The bond protects the husband from injury. *State v. Judge of the first District*, 2 R. R. 395.

179. Where a verdict had been found, but no final judgment rendered, and defendant appealed, on the refusal to grant a new trial, the appeal must be dismissed. *Walton v. Louisiana State Marine and Fire Insurance Co.*, 2 R. R. 562.

180. Plaintiffs, having issued execution against defendants, took a rule on the latter to show cause why they should not be ordered to produce their books, that plaintiffs might inspect them. The rule was made absolute, and the sheriff ordered to seize the books. On an application by defendants for a writ of prohibition: *held*,

that if they had sustained or apprehended irreparable injury, their remedy was, by appeal. *State v. Judge of the Commercial Court of New Orleans*, 2 R. R. 566.

181. The authorization required to enable a married woman to appeal from a judgment rendered against her, must be proved by other evidence than her own allegations, or those of her counsel. *Gorman v. Berghans*, 2 R. R. 282.

182. To entitle one, not a party to the cause, to an appeal from the judgment, under art. 571 of the Code of Practice, he must have a pecuniary interest and be aggrieved. Where the interest is not apparent on the record, the case will be remanded to ascertain it. *Succession of Henderson*, 2 R. R. 391.

183. The surity in an injunction bond may be surety for his principal on an appeal by the latter from a judgment dissolving the injunction, and condemning principal and surity, *in solido*, to the payment of damages and costs. *Greiner v. Prendergast*, 2 R. R. 235.

184. No appellant but the State is exempt from the law requiring surety on granting an appeal, whether devolutive or suspensive. *Id.*

185. The surety in an appeal bond, who pays the amount of the judgment obtained against his principal, will, under art. 2157 of the Civil Code, be legally subrogated to all the rights of the plaintiff whose claim he has satisfied, and may, on a rule to show cause being made absolute, take out a *fi. fa.* against the bail in the suit, whose liability has been fixed, for the whole amount paid by him. *Howe v. Frazer*, 2 R. R. 424.

186. A person cannot be received, in his private capacity, as surety on an appeal from a judgment against him as the executor or curator of a succession, though the succession itself be solvent. *State v. Judge of the Court of Probates of New-Orleans*, 2 R. R. 449.

187. Where the security, given within the ten days to obtain a suspensive appeal, and accepted by the judge is afterwards rejected, the appeal should not be dismissed without allowing the party time to procure other security. *State v. Judge of the Court of Probates of New-Orleans, re-hearing*, 2 R. R. 452.

188. The right of inquiring into the sufficiency of the surety on an appeal bond, and of deciding whether the appeal shall be suspensive or devolutive, is exclusively within the province of the Court from which the appeal is taken. The sufficiency of the surety may be tried, on motion; and if any error be committed by the Court in refusing to make the appeal suspensive and authorizing the issuing of execution, the remedy is by writ of prohibition. *Stanton v. Parker*, 2 R. R. 550.

189. When the surety becomes insolvent after the appeal is brought up, it is the same as if no security had been given; and such insolvency must be inquired into before the Court which gran-

ted the appeal. Though divested of all jurisdiction as to the case itself, it is empowered to decide whether execution may be taken out, notwithstanding the appeal. *Stanton v. Parker*, 2 R. R. 550.

190. Defendant commenced an action to rescind a contract of loan for \$200,000, the amount of which was secured by mortgage, and obtained an injunction to restrain the plaintiffs from summary proceedings under the mortgage until the further order of Court. The injunction having been dissolved, he and his sureties in the injunction bond took a suspensive appeal, giving security in the sum of \$6,000. Plaintiffs thereupon applied for an order of seizure and sale, which was refused, on the ground of the pendency of the appeal from the order dissolving the injunction. On appeal by the plaintiffs from this judgment; *held*, that a suspensive appeal having been taken from the judgment of dissolution, the injunction was thereby maintained until the final decision of the appellate Court. *City Bank of New-Orleans v. Walden*, 2 R. R. 181.

191. No proceedings can be had in an inferior Court, in relation to the subject matter of a case pending in the Supreme Court, until the expiration of three judicial days after judgment has been pronounced by the latter, within which time a re-hearing may be granted, and the judgment amended or entirely changed. *Bedford v. Saunders*, 2 R. R. 285.

192. An attachment having been levied on the property of an absconding debtor, certain creditors, on the same day, prayed for a forced surrender of his property, and obtained an order for a meeting of creditors and a stay of proceedings, the proceedings for a forced surrender having been set aside on appeal, on account of the insufficiency of the petition, other creditors, not parties to the proceedings for a surrender, procured an attachment from the lower Court on the day on which the judgment was pronounced by the appellate tribunal, which was levied on the property of the debtor. The property seized under the first attachment proving insufficient, the creditors who sued it out, caused a *fi. fa.* to be issued on the judgment which they had in the mean time obtained, and seized the property, which had been attached on the day on which judgment was pronounced on the appeal. *Held*, that the seizure under the *fi. fa.* was good, and that the second attachment, having been issued before the expiration of three judicial days from that on which the judgment was pronounced, was null. *Id.*

193. An act of sale stipulated that the notes given for the price were to remain with the notary, until a mortgage existing on the property should be cancelled. Plaintiffs obtained an order of seizure and sale, without having produced any evidence of the cancelling of the mortgage. On an appeal by the defendant, and assignment of the want of evidence of the cancelling as error apparent on the face of the record, plaintiffs offered a certificate of the recorder of mortgages to show that the mortgage had been cancelled. *Held*, that the cancelling not having been alleged or

proved in the inferior Court, no evidence could be offered to prove it on the appeal. *Petit and wife v. Grandmont*, 2 R. R. 283.

194. Evidence presented by one of the parties, but not contained in the record, will not be permitted, under any circumstances, to influence the decision of the Court. *Stillwell v. Bobb, re-hearing*, 2 R. R. 327.

195. An error into which the jury have fallen, in fixing the period from which interest is allowed, which appears from the facts found by them and from the record of the suit, may be corrected by moving for a new trial, or by an application to the judge. Where such error does not exceed the fraction of a dollar, and no attempt has been made to correct it below, the judgment will not be disturbed on appeal. *Mullen v. Miller*, 2 R. R. 23.

196. The verdict of a jury will not be disturbed unless manifestly erroneous. *De Blanc v. Martin*, 2 R. R. 82.

197. The decision of the lower Court as to the admission or rejection of a witness, not introduced at the regular time, will be affirmed, unless the discretion allowed in such instances clearly appears to have been incorrectly exercised. *Pilié v. Kenner*, 2 R. R. 95.

198. Where the creditors of a succession are litigating their rights contradictorily with each other, and the value of the succession exceeds three hundred dollars, an appeal will lie to the Supreme Court, though the claim of each creditor may not amount to that sum. *Succession of Field*, 3 R. R. 5.

199. Where the act which imposes a fine prescribes that it shall be recovered by a civil action, the officers of the State cannot, by instituting a suit in the form of an indictment, deprive the party of the right of appeal to the Supreme Court. *State v. Linton*, 3 R. R. 55.

200. An appeal will lie from an order maintaining an injunction until the succeeding term of the Court; it is an interlocutory judgment which may effect irreparable injury. *Newell v. Morton*, 3 R. R. 102.

201. Where the matter really in dispute is under three hundred dollars, and a larger amount is claimed in the petition, evidently for the purpose of giving jurisdiction to the appellate Court, the appeal will be dismissed. *Dubbs v. Stevens*, 3 R. R. 143.

202. The jurisdiction of the Supreme Court is to be determined by the value of what is claimed in the petition, not by the amount allowed by the judgment. *Gerber v. Marzoni*, 3 R. R. 370.

203. An appeal will lie from a judgment on a demand in reconvention, where the sum claimed in reconvention is sufficient to give jurisdiction to the appellate Court, though the original demand be under three hundred dollars; but the judgment on the latter cannot be examined into. The demand in reconvention is in the nature of a new action. *Gove v. Kendig*, 3 R. R. 387.

204. No appeal will lie from an order, discharging a rule to

show cause why an injunction should not be dissolved, on the ground that the petition sets forth no legal cause for issuing it. The order is an interlocutory one, and works no irreparable injury. If erroneous, it may be corrected by appeal from the final judgment. *Osborne v. Clayton*, 3 R. R. 437.

205. Where an appeal is taken, after the laps of twelve months from the day on which final judgment was rendered, by one who alleges on his petition of appeal that he is a *non-resident*, and the allegation is denied, the case will be remanded to try the issue; and until the judgment rendered thereon, and the evidence on which it is based, is sent up, no opinion will be pronounced on any other point in the case. *Griffing, and others, heirs, v. Bowmar*, 3 R. R. 112.

206. The general doctrines relative to the interruption of prescription, do not apply to the period fixed by art. 593 of the Code of Practice, after which no appeal will lie. No appeal can be taken after the expiration of that time, though one may have been dismissed, which was taken within the period. *Griffing, and others, heirs, v. Bowmar*, 3 R. R. 113.

207. Where, after obtaining an order allowing him an appeal, plaintiff does not appear to have attempted to avail himself of it by giving bond and security, nor to have taken any steps, until after the expiration of a year from the date of the judgment, to procure a transcript of the record, nor to have made any application to the judge *a quo* for a new appeal, the right of appeal will be lost. *Sibley v. Roman Catholic Congregation of Natchitoches* 3 R. R. 77.

208. When the period has elapsed within which a party might have appealed, he will not be allowed to contest his rights in the name of another appellant. *Griffing v. Bowmard*, 3 R. R. 113.

209. In an action to recover the undivided half of a tract of land, for the rents and profits from the commencement of defendant's illegal possession, and for a division of the tract, there was a judgment for the plaintiff for the portion of the land claimed, and in favor of the defendant for a certain sum for his improvements over and above the amount due by him for rents and profits. the decree ordered a partition of the land. In conformity with the part of the judgment ordering a partition, plaintiff proceeded to have the tract divided, and the respective portions designated by a further decree homologating the proceedings of the notary and experts in making the partition, and ordering himself to be put in possession of the half allotted to him, on paying the amount previously adjudged to be due for the improvements. *Held*, that this was not such an acquiescence, on the part of the plaintiff, in the judgment, by voluntarily executing it, as is contemplated by art. 567 of the Code of Practice, and will not prevent his appealing from so much thereof as condemns him to pay for the improvements

above the rents and profits. *Milliken and husband v. Rowley*, 3 R. R. 253.

210. The signature of the appellant is not necessary to the appeal bond. His obligation, to discharge any judgment rendered against him on the appeal, results from the judgment itself. *Fisk v. Friend*, 3 R. R. 264.

211. Where through error, an order has been made allowing a suspensive appeal on security for costs only, and no transcript of the record has been delivered to the party, the order may be rescinded by the lower Court on a rule to show cause. *Mathison v. Field*, 3 R. R. 42.

212. Where the amount fixed by the judge for the appeal bond, is less than that required by law to render the appeal suspensive, it will be good as a devolutive one; the bond, in the latter case, being only to secure the payment of the costs. *Tipton v. Crow*, 3 R. R. 63.

213. In an action on a joint contract, the suit was dismissed by the Inferior Court, as to one of the defendants, on the ground of his domicil being in a different Parish. Plaintiff took no appeal from the judgment of dismissal, but obtained a judgment against the other defendant. On an appeal by the latter: *held*, that the action being on a joint contract, both contractors must be before the Court; that the plaintiff having failed to make use of the means given him by law to reverse the erroneous decision of the inferior Court, cannot avail himself of his own neglect; and that there must be judgment, as in a case of non suit. *Thompson v. Chrétien*, 3 R. R. 26.

214. The testator had bequeathed all his estate to his mother and one of his sisters. An order for a sale of the property having been procured by the executor, a sister of the deceased, to whom no part of the estate had been left, obtained an injunction to prevent the sale, and the curator of the testator's mother, an interdicted person, intervened in the suit, alleging that the latter was a forced heir recognized by the will, that the injunction was for her benefit as well as the plaintiff's, claiming part of the damages sued for and praying to be allowed, with the consent of the plaintiffs, to unite with the latter, and to pay a part of the costs. Answer by defendant to the petition of intervention, denying the right of the curator to intervene; and judgment dissolving the injunction, and ordering the executor to proceed with the sale. On an appeal by plaintiff and intervenor: *held*, that the plaintiff having no interest in the succession of the testator, had no right to interfere with its administration: and that no judgment having been rendered for or against the intervenor, in the lower Court, his appeal must be dismissed. *Field v. Mathison*, 3 R. R. 38.

215. Where an appeal is taken from a judgment in an action on a joint contract, all who were required to be parties below, must be made parties to the appeal, and this, though a part only

have appealed, or the appeal will be dismissed. *Drew v. Atchison*, 3 R. R. 140.

216. All the parties who are interested that the judgment should remain undisturbed, must be parties to the appeal, or it will be dismissed. *Garcia, &c. v. their creditors*, 3 R. R. 436.

217. A creditor of an insolvent, in whose favor a judgment has been rendered, on a tableau of distribution, securing him a privilege or mortgage, must be made a party to any appeal, taken by an other creditor or the syndic, for the purpose of reversing such judgment. *Id.*

218. Where an appellee resides in the State, service of citation of appeal must be on the party himself, and not on his counsel. *Lee v. Kemper*, 3 R. R. 1.

219. Under the act of 20th March, 1839, time will be allowed to correct any errors or omissions in the record of appeal or in the service of citation of appeal, where such errors or omissions did not result from the fault or neglect of the appellant. *Id.*

220. Failure to serve citation of appeal in due time, will authorize the appellee to delay his answer until the expiration of the period allowed him by law, or, perhaps, to require a new citation, but not to demand the dismissal of the appeal. *Grove v. Harvey*, 3 R. R. 271.

221. Where it does not appear from the record, that the amount in controversy exceeds three hundred dollars, the appeal must be dismissed. The appellant must show that he is entitled to an appeal. *Hall v. Sanders*, 3 R. R. 10.

222. Third persons, not parties to the suit, who allege themselves aggrieved by the judgment, to whom the right of appeal is given by art. 571 of the Code of Practice, are entitled to avail themselves of every thing in the record affecting their rights. *Griffing v. Bowmar*, 3 R. R. 113.

223. Where the record shows that the defendant moved to have a judgment by default set aside, he will not be permitted to urge before the appellate Court, that no such judgment was obtained. *Hemken v. Farmer*, 3 R. R. 155.

224. It is not required that the grounds upon which a judgment by default was taken, should be stated in the record. The absence of any exception, or answer, is, itself, evident and sufficient ground. *Id.*

225. Where the record contains the evidence on which a judgment by default was made final, it is unnecessary that it should state that it was taken down at the request of either party. *Id.*

226. A certificate by the clerk, that the record "contains all the evidence upon which the judgment appealed from was rendered," is insufficient. *Grand Gulf Rail Road and Banking Co. v. Douglass*, 3 R. R. 169.

227. Where the appellee has answered to the merits, and the record is so defective that the case cannot be examined, and justice

requires that it should be tried *de novo*, the judgment of the lower Court will be reversed, and the case remanded. *Grand Gulf Rail Road and Banking Co. v. Douglass*, 3 R. R. 169.

228. Where the evidence has not been taken in writing, it is the duty of the appellant to require the adverse party to join him in drawing up a statement of the facts, or, in case of disagreement or refusal, by the other party, to apply to the Court to make such a statement, in order that the clerk may prepare a complete record of the case. *Id.*

229. A bill of exceptions is only necessary, where something is to be brought to the knowledge of the appellate Court, which would not otherwise appear in the record. *Harrison v. Waymouth*, 3 R. R. 340.

230. A prayer for the amendment of a judgment must be made when the answer to the appeal is filed. It will be too late, when the case is fixed for trial. *McGuire v. Bry*, 3 R. R. 196.

231. An exception to the jurisdiction of the Court, waived below, cannot be revived in the appellate Court. *Reynolds v. Rowley*, 3 R. R. 201.

232. There is a class of exceptions which may be pleaded for the first time on the appeal; but the facts necessary to sustain them, must appear from a mere inspection of the record. *Zollicoffer v. Briggs*, 3 R. R. 236.

233. The verdict of a jury will not be disturbed, unless clearly wrong. *McCoy v. Hunter*, 3 R. R. 118. *Hughes v. Lee*, 3 R. R. 429.

234. A case will not be remanded, after appeal, on an affidavit of newly discovered evidence. The Court cannot notice any thing which may have occurred subsequent to the date of the judgment appealed from. *Succession of Hamblin*, 3 R. R. 130.

235. On a question of fact, the judgment of the lower Court will be affirmed, unless manifestly erroneous. *Bordelon v. Kilpatrick*, 3 R. R. 159.

236. Action for the balance of an account, with interest, and verdict and judgment in favor of plaintiffs for a certain sum, without interest, and no new trial applied for by the latter. On an appeal by defendant, and prayer by plaintiffs for the amendment of the judgment, so as to allow the interest claimed: *held*, that no attempt having been made to correct the judgment in the Court below, by moving for a new trial, no amendment can be allowed in the appellate Court. *Lambeth v. Burney*, 3 R. R. 251.

237. The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result. *Ferguson v. Whipple*, 3 R. R. 344.

238. Objections to a verdict lose much of their weight, when not made before the Court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment

of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial. *Hughes v. Lee*, 3 R. R. 429.

239. The decisions of inferior tribunals in matters addressed to their discretion, will not be interfered with, unless in cases of extreme hardship or manifest injustice. *Gottheil v. Fisk*, 3 R. R. 434.

240. Where the petition prays for a judgment against defendants *in solido*, and one of the latter severs in his answer, but does not plead that the obligation is joint only, and judgment is rendered against defendants *in solido*, it will not be disturbed on appeal. *Comstock v. Paie*, 3 R. R. 440.

241. The Court has no authority to give damages for a frivolous appeal, when not prayed for. *Garrett v. Grimbail*, 3 R. R. 8.

ARBITRATION.

1. Arbitrators must determine as judges agreeably to law. *Church of St. Patrick v. Dakin and anothers*, 1 R. R. 202.

2. An award must decide the whole matter submitted, and not go beyond the submission. It must be certain, final and conclusive, leaving no matter of fact or law undecided. *Id.*

3. Every fact and question must be so presented by an award, as to enable the Court to act on the award itself, and to execute it as a whole ; though the mere omission to determine an exact sum will not annul it, where the arbitrators have given the necessary information to enable the Court to fix the amount without going out of the award itself. *Id.*

4. The provision of article 3096 of the Civil Code, that an award, in order to be executed, must be approved by the judge, is only intended to invest it with sufficient authority to insure its execution, and not to submit its merits to the examination of the judge, which can only be done by appeal. *Id.*

5. A provision in articles of co-partnership, that all disputes, growing out of the partnership transactions shall be submitted to arbitration, does not apply to an action, instituted after the dissolution of the partnership by the death of one of the members, for a final settlement of the partnership affairs. *Gallier v. Walsh and another*, 1 R. R. 226.

ARBITRATORS.

1. The power of arbitrators may continue for three months after the submission, unless the parties agree to revoke it sooner. But if they, or any one of them, refuse to act, the parties are left to

their legal remedy without any delay. *Lallande v. Bonn*, 13 L. R. 462.

2. Judicial arbitrators appointed to decide a suit already pending, may refuse, without assigning reasons, at any time before taking the oath. *Id.*

ARBITRATORS AND AMICABLE COMPOUNDERS.

1. When all matters in the pleadings are submitted to amicable compounders, that they should pass upon and settle all accounts between the parties; their award, when there has been no fraud and misconduct or extreme partiality, will be made the judgment of the Court, without revision or alteration. *Canty v. Beal*, 17 L. R. 282.

ARGUMENT OF CASE.

1. A party against whom an order of seizure and sale had been issued, presented a petition alleging that the mortgage and notes were obtained by fraud, and that the mortgage was illegally executed, and praying for an injunction, for a judgment rescinding the act, for damages against the mortgagee, and a third person, alleged to have been concerned in the fraud, and for a trial by jury. The mortgagee answered, praying that the injunction might be dissolved, the demand rejected, and for a judgment in his favor for the amount of his debt. *Held*, that the causes of opposition not being confined to those enumerated in art. 739 of the Code of Practice, and the proceedings having been changed from the *via executiva* to the *via ordinaria*, the mortgagee must be considered as a defendant in the proceedings to obtain the injunction; and that the other party, like other plaintiffs was entitled to open and close the argument. *Beaulieu v. Furst*, 3 R. R. 345.

ARREST.

1. A debtor, doing business as a merchant, without any fixed domicile in the place, and living with his family at a boarding house, is liable to arrest and sequestration of his moveables and baggage, for his boarding expenses, on the affidavit of the inn keeper, or landlady declaring she fears he may remove with his effects and baggage out of the jurisdiction of the Court. *Wooster v. Salzman*, 14 L. R. 98.

2. An affidavit which states that the insolvent has received as

a depository certain property which he refuses to deliver up to the claimant, is insufficient to obtain an order of arrest. These circumstances are in no way calculated to induce the belief that the debtor is about to depart from the jurisdiction of the Court, or secrete his person from his creditors. *Toutain v. his creditors*, 14 L. R. 336.

3. Art. 221 of the Code of Practice which provides that a creditor may, under certain circumstances, arrest a debtor about leaving the state, when the debt is not yet due, is limited to cases in which such debtor was a resident at the time of contracting the debt, or being a non-resident, bound himself not to leave the state before giving security, or before the debt became due. *Armistead and another v. Sanderson*, 1 R. R. 176.

4. Where a debt has been contracted with a non-resident, by a party who knew him to be such, the former cannot be arrested before the debt becomes due, on the ground that he is about leaving the state with the intention of defrauding his creditors, where such intended departure is the only circumstance offered to justify the suspicion. *Armtstead and another v. Sanderson*, 1 R. R. 176.

5. On a rule to show cause why an order of arrest should not be dissolved, in a case in which property had been previously attached, proof of the insufficiency of the property attached will not be on the plaintiff, where its sufficiency was not made a ground of the rule to quash the arrest. *New Orleans Canal and Banking Co. v. Comly*, 1 R. R. 231.

6. The act of 28th March 1840, abolishing imprisonment for debt, by relieving bail from the obligations they had entered into, deprived them of any right over their principal. *Ex parte Lafonta*, 2 R. R. 495.

ARREST AND HOLDING TO BAIL.

1. Where a non-resident is held to bail, but leaves the State before service of the petition is made on him, the suit will be dismissed. *Slocomb et al. v. Bowie et al.*, 13 L. R. 10.

2. In the oath or affidavit for the arrest of a debtor, the affiant must swear from his *personal* and direct *knowledge*, that the debt is due and unpaid, and not from what he may have learned from others. *Park v. Pyne et al.*, 13 L. R. 212.

3. The agent of the creditor must swear to the indebtedness of the defendant from personal and direct knowledge, to obtain an order of arrest, and not from what he may have heard from any other person whatever. *Sandford et al. v. Pyne et al.*, 13 L. R. 303.

4. A debtor who is about to absent himself from the State,

even for a limited time, may be held to bail, if he leaves no property in the State. *Roberts et al. v. Page*, 13 L. R. 452.

5. So, where the defendant who was a captain of a steamboat, trading to Havana, was about leaving on a regular voyage, to return immediately: *held*, that he was liable to arrest at the suit of a creditor, when it was not shown that he owned or possessed any property. *Id.*

ASSIGNMENT OF DEBTS.

1. The assignment of *part of a debt*, will be enforced in the Court of Chancery, and by the Courts of this State, when the obligation resulting from the assignment of a part of the debt may be implied from the custom of trade, or course of business between the parties. *Jackson v. Tiernan et al.*, 15 L. R. 485.

ASSIGNMENT AND TRANSFER.

1. An assignment or transfer of debts, rights and claims, takes place by delivery of the titles, but the transferee is only possessed, as respects third persons, after *notice* has been given to the debtor of the transfer. *Kimball v. Plant et al.*, 14 L. R. 10.

2. In an action to annul a transfer of certain notes, alleged to be made on the eve of insolvency, and in fraud of seizing creditors, it must be shown to the satisfaction of the Court, that the debtor was insolvent at the time of the transfer, and that the defendants knew of his insolvency. *Hubbard et al. v. Hobson et al.*, 14 L. R. 453.

3. The transferee of a note, *not endorsed*, but transferred by a special assignment by the payee written on the back of it, cannot maintain an action against the transferor. *Martin v. McMasters*, 14 L. R. 420.

4. The transferor is only responsible for the *existence* of the debt, at the time of the transfer of the note, but is not liable if it is not paid by the debtor. *Id.*

5. The words "without recourse" added to a written assignment, do not alter the legal obligation of the parties, resulting from the written assignment alone. *Id.*

6. An assignment made by a debtor for the benefit of such creditors as become parties to it, and declared null as to those not parties, does not prevent a creditor who signed, from suing and recovering his debt, and to be paid out of the funds in the hands of the assignee or agent of the creditors, *pro rata* with others. *Underhill et al. v. Townsend & Jones*, 17 L. R. 517.

7. There is no particular form of assignment required in the

transfer of a debt. It is sufficient if knowledge of the transfer is brought home to the debtor, and that he knew his former creditor was divested of his rights to the debt assigned, and that such knowledge of the fact was derived from the transferrer or his agent. *Gillett v. Landis et al.*, 17 L. R. 470.

8. The holder of notes transferred to a third person, giving them up to the transferrer improperly, will be liable to the transferee only for their *value*, at the *time* of the transfer. *Id*

9. A subsequent transfer of notes with notice and delivery, will hold good against a prior pledge and transfer by notarial act, without actual delivery, although due notice had been given. *Winches v. Ory's syndics* 17 L. R. 428.

ATTACHMENT.

1. Where the endorser sues the maker of a note not yet due, it is not a proper case for attachment, as he does not show an existing debt due to him by the defendant, nor an absolute liability incurred as surety. *Taylor v. Drane*, 13 L. R. 62.

2. Where an attaching creditor swears, that the sum of two thousand three hundred and fifty dollars *besides interest, damages, &c.*, is due and owing to him, he will be required only to give bond for an amount exceeding by one half *the principal sum due*, disregarding the interest and damages as too indefinite. *Pope et al. v. Hunter*, 13 L. R. 306.

3. Where the petition claims a larger sum, by annexing a fixed rate of damages and interest, than that sworn to in the affidavit, on which the attachment had been obtained, it does not vitiate the attachment. *Id.*

4. The affidavit necessary to obtain an attachment for a debt *not due*, must be special, according to the act of 1826; and the creditor, or his agent must swear, that the debtor is about to remove his property out of the State, before the debt becomes due. *Crooke et al. v. Rutherford & Metcalf*, 13 L. R. 479.

5. Where cotton is shipped to factors, with instructions to lay out the proceeds in groceries, and if the purchases should exceed the amount, other cotton will be remitted by the first boat; they cannot hold the cotton in their possession, subject to any balance on such purchases, against attaching creditors of the owners. *Smith & Wright v. McCall et al.*, 14 L. R. 7.

6. An assignment by a debtor in New-York, of his property, in trust for the benefit of *all his creditors*, wherein credits in Louisiana are assigned, cannot defeat an attachment levied on those credits by even a New-York creditor, before *notice* of the assignment to the garnishee or debtor. *Kimball v. Plant et al.*, 14 L. R. 10.

7. The defendant in attachment may bond the property, and

thus dissolve the attachment. He has a right to this, in order to relieve himself and his surety from the effect of his obligation, resulting from his attachment bond. *Pailhès v. Roux*, 14 L. R. 82.

8. An attaching creditor may, at the same time, proceed by personal citation against his debtor. *Gibson v. Huies and Diggs v. Hunter et al.*, 14 L. R. 124.

9. Where a defendant *avers* that a certain note held by him and attached in the hands of the makers, was transferred by him before service and notice of the attachment, and fails *to show this*, it will be taken for granted he is still in possession, and the attachment will stand. *Same case on a re-hearing*, 14 L. R. 129.

10. If a promissory note be attached in the hands of the makers before it is due, the holder, who is defendant, cannot defeat the attachment by transferring the note, after notice to the garnishees. *Id.*

11. Attachments of negotiable paper in the hands of the makers, does not restrain its negotiability, provided the transfer be made before maturity, and without notice of the existing attachment to innocent purchasers. *Id.*

12. Where the plaintiff in attachment sets forth in his affidavit, that the sum claimed in the petition, "*is justly due him*," and the petition states that "the defendant is indebted to him" in this sum, the affidavit is sufficient. *Boone v. Savage*, 13 L. R. 169.

13. Attachment will lie against a person *who has not resided one year* in the state, even after he has elected his domicile here. *Id.*

14. An attachment lie against the property of a corporation, incorporated by the laws of another state. *Martin, Pleasants & Co. v. Bank of Alabama*, 14 L. R. 415.

15. Negotiable notes cannot be attached in the hands of the maker, after they are put in circulation. It can only be done by either seizing the notes, or attaching them in the hands of a person, holding them as the property of the debtor. *Sheets & Grover v. Culver et al.*, 14 L. R. 449.

16. The attachment allowed by the act of 1826, in the case of a debt not yet due, was not intended as a means of bringing the debtor into Court, but only as a conservative measure. *Adams et al. v. Day*, 14 L. R. 503.

17. Where the defendant in attachment shows, by *prima facie* evidence, that the facts stated in the affidavit are untrue, it will throw the burden of proving their verity on the plaintiff. *Adams et al. v. Day*, 14 L. R. 503.

18. And when there is no notice given of an assignment of a debtor's property, it is liable to attachment in his hands. *Id.*

19. Negotiable notes cannot be attached in the hands of the maker, after they are put in circulation. *Kimball v. Plant et al.*, 14 L. R. 511.

20 Where it is shown, that the proceeds of certain cotton has

been passed to the credit of the intervenors, on the books of the defendants, the cotton will be liable to the attaching creditors of the latter. *Carman et al. v. Anderson et al., A. & J. intervenors*, 15 L. R. 135.

21. Where the plaintiff's debtor placed drafts in the hands of an agent for collection, with orders to collect and remit the proceeds to the plaintiff, and in the meantime, another creditor attaches these funds in the hands of the agent: *held*, that the attachment is good, and that the funds are liable to be attached by any creditor until placed beyond the reach of creditors by remittance. *Wilson & Co. v. Lizardi et al.*, 15 L. R. 255.

22. Where a stock of goods are shown to have been purchased on the credit of a third party, under false and fraudulent pretences of the defendant, and the former takes them into his possession with the view to sell them and take up his drafts and acceptances given for the price, he will hold them against an attaching creditor of the defendant. *St. John et al. v. Sanderson : Cochran, intervenor*, 15 L. R. 346.

23. The first attaching creditor, will be allowed the full amount of his judgment, in preference to others who attach after him. *Hepp v. Glover et al.*, 15 L. R. 461.

24. An attaching creditor does not acquire greater rights to the property attached, than the defendant himself possesses. *Id.*

25. When the owner has lost all power over his property, or has not yet acquired such power as to permit him to dispose of it to the prejudice of others, creditors cannot attach. *Hepp v. Glover et al.*, 15 L. R. 461.

26. So, seizing and attaching creditors cannot defeat the claim of the vendor, and deprive him of his right of stoppage *in transitu*. *Id.*

27. An attachment can only have effect for the amount of the judgment obtained against the defendant, in which it issued. *Id.*

28. Attaching creditors should be paid in the order of dates of their attachment, and not *pro rata*. *Id.*

29. Where no property of an absent defendant has been seized in a suit by attachment, no judgment can be rendered against him, and the attachment will be set aside. *Oliver v. Gwin*, 17 L. R. 28.

30. When the plaintiff in attachment, points out persons, in whose hands he expects to find property of his debtor and makes them garnishees, and they, by their answers show there is none, the suit cannot be maintained. *Id.*

31. The seizure of any property however small, will support an attachment; and the attachment extends to every species of property; to all rights and credits, and to partnership property, in a suit against one of the members of a firm. *Id.*

32. Where garnishees intervene, claim and bond the property attached, on the ground that it belongs to them, it is no appearance in Court, on the part of the defendant in attachment, and cannot give jurisdiction. *Id.*

33. The statute law of Mississippi, authorizes defendant in attachment, for debts not due, to give bond with security for the payment of the debt at maturity, which is binding, on the principal *and surety*, without any judgment having been first obtained by the creditor against his debtor, for the amount of his demand. *Church et al. v. Henry*, 17 L. R. 70.

34. An attachment bond for a sum exceeding by one half *that claimed*, must be given with one good and solvent surety, residing within the jurisdiction of the Court, sufficient to answer *for the amount of the obligation*, before a writ of attachment can issue. *Jackson, Ridlle &c. v. Warwick*, 17 L. R. 436.

35. If it appears that the surety is not worth the full amount of the attachment bond, although he may be fully able to answer to the amount of property *actually attached*, the attachment will be set aside. *Id.*

36. An attaching creditor cannot avail himself of any complaint or claim, his debtors might have on a third party for damages, on account of unusual delay in a voyage, until they complain. The plaintiff cannot attach their action for damages. *Leefe v. Walker et al.*, 18 L. R. 1.

37. An attachment levied on the two thirds interest of the debtor in the cargo, cannot avail, unless there is *a surplus*, after paying all the charges and losses on the vessel and cargo. *Id.*

38. A sale of a stock of goods, although by notarial act, when shown to be in fraud of creditors, will not exempt them, even in the vendee's possession, from *bona fide* attaching creditors of the vendor. *Meeker & Lewis v. Hays et al.*, 18 L. R. 19.

39. An attachment is dissolved on bonding the property attached. The plaintiff then looks to the bond, and not to the property to satisfy his demand. If he fails in his suit, the bond is discharged. *Dorr et al. v. Kershaw et al.*, 18 L. R. 57.

40. So a third person, claiming property attached and bonded, cannot intervene in the suit between plaintiff and defendant. He must look to the person in possession of the property. *Id.*

41. Where cotton is shipped to consignees, who are entitled to a right of privilege, so that the consignor or owner could not take it out of their hands, *his creditors cannot attach it in their hands*. *Powell v. Aiken & Gwinn et al.*, 18 L. R. 321.

42. So, where the defendants gave an order on their attorneys, to pay over the proceeds of certain cotton, which they had attached to the intervenors, to be credited in their (*defendants'*) account, it is good against subsequent attaching creditors. *Id.*

43. *Garland J. dissenting*. It is not shown that the intervenors made any *specific advance* on the 13 bales of cotton, and are therefore not entitled to a privilege under the article 3214 of the Code; consequently the plaintiff's attachment ought to hold the cotton. *Id.*

44. The act of 1826, which declares that in cases where the

debt is not yet due, and the creditor swears his debtor is about to remove his property out of the State before said debt becomes due, "an attachment may issue", does not apply to steamboats and vessels, which from their nature must necessarily be taken from the state in their regular business. *Russell et al. v. Wilson*, 18 L. R. 367.

45. Where an amended petition was filed, with a new affidavit and bond, correcting the name of the defendant, but no new order of attachment was granted: *held*, that the attachment issuing thereon is a nullity. *Purdee v. Cocke*, 18 L. R. 482.

46. Where the attachment is dissolved, it is at the costs of the plaintiff, and the judgment should so state it, although the case is tried on the merits, by the appearance of the defendant, and judgment goes against him. *McKown v. Mathes*, 19 L. R. 542.

47. Where in a suit by attachment an intervenor establishes his claim to the property seized, the costs must be borne by the party cast. But where, in such a case, by an agreement between the parties, including the intervenor, the property, being of a perishable nature, is sold, and the proceeds deposited to await the decision, the sheriff will be entitled to retain out of the proceeds, the expenses of the sale, and of the safe keeping of the property from the date of such agreement. The agreement was for the benefit of all: and the sheriff was their agent to carry it into effect. The intervenor must look to the plaintiff for reimbursement. *Graham v. Swayne*, 1 R. R. 186.

48. Where a factor who has received instructions to pay a debt out of the proceeds of property consigned to him for sale, for the purpose of preventing an attachment; advances the amount, and pays the debt before any attachment is levied, his privilege for such advance on the property consigned will be superior to that acquired by a subsequent attachment. *Hundley v. Spencer and another*, 1 R. R. 209.

49. No appeal will lie from a judgment on a rule to show cause why an attachment should not be set aside. The Judgment is an interlocutory one, works no irreparable injury, and may be corrected, if erroneous, by appeal from the final judgment. *Hart v. Philipps*, 1 R. R. 223.

50. Where property has been attached, on an affidavit that the defendant had left the State with the intention of never returning, his subsequent return will not alone be sufficient to dissolve the writ, where circumstances render it probable that his original intention was not to return; otherwise, where nothing suspicious existed, or where an intention to return was proved. *New Orleans Canal and Banking Co. v. Comly*, 1 R. R. 231.

51. Property attached is not represented by the bond given for its release; nor can the question of ownership be examined after it has been bonded. *Beal v. Alexander*, 1 R. R. 277.

52. A rule against the sureties in a bond for the release of

property attached, to make them responsible where the judgment has not been satisfied, is, under the act of 20th March, 1839, to be tried summarily and without a jury, unless the defendant alleges under oath that the signature is not genuine, or that the judgment has been satisfied. *Beal v. Alexander*, 1 R. R. 277.

53. A clerk has a general privilege on all the property of his employer: a sale accompanied by delivery, destroys this privilege; not so an attachment. The property attached belongs to the original owner, until divested by a sale; and the privilege of a clerk, will entitle him to be paid in preference to the attaching creditor. *Tiernan v. Murrah and another*, 1 R. R. 443.

54. Plaintiff attached certain cotton as the property of defendants. Proof that it had been previously sold by defendants to intervenor, who had given for the price a note which was protested at maturity, and still unpaid. The sheriffs' return showed that he had "attached seventy bales of cotton, which was subsequently released on the execution of a bond by the consignees." Urged, on behalf of plaintiffs, that though the attachment could not hold the cotton, it was good as to defendants' privilege as vendors, *Held*, that the return showed that no such right had been attached; and that the lien, if any existed, attached to the cotton, which had been sold. *Slocumb v. real estate Bank of Arkansas*, 2 R. R. 92.

55. When the owner of property has lost all control over it, and cannot change its destination, it cannot be attached by his creditors. *Urie v. Stevens*, 2 R. R. 251.

56. To recover damages for an illegal attachment, or for the hire of slaves seized by attachment, it is not necessary to put the attaching party in default. But where an attachment has been levied on slaves, and they have, with the consent of the debtor, remained in the hands of the plaintiff in attachment, to enable the former to recover their value, the latter must be put in default otherwise than by the institution of suit. *Cox v. Robinson*, 2 R. R. 313.

57. Where a plaintiff voluntarily abandons his attachment, he renders himself and his surety responsible in damages; and where such attachment has been set aside by order of Court, it is *prima facie* evidence that it was illegally issued, and that damages to some extent have been sustained. *Id.*

58. The possession of a bill of lading like that of a bill of exchange, is *prima facie* evidence of title; and, in the absence of contradictory evidence, will entitle an intervening claimant to bond property seized by attachment. *Park v. Porter*, 2 R. R. 342.

59. The claim of a consignee, for advances, is superior to that of an attaching creditor, where the former had received the bill of lading previous to the attachment. But proof of such advances will not defeat the attachment of the latter, who will be entitled

to any surplus after payment of the advances and necessary expenses. *Park v. Porter*, 2 RR. 342.

60. An uninterrupted residence of one year within the State, is necessary, under the acts of 7th March, 1816, and 16th March, 1818, to acquire a domicile in this State; and until so acquired, a party may be sued by attachment as a non-resident. It is not necessary that he should have remained the whole time within the State, provided that, during any temporary absence, he retained an office or room as his residence, and left some authorized agent to represent him. *State v. Judge of Court of Probates of New Orleans*, 2 R. R. 449.

61. The execution of an attachment bond, is no waiver of the party's right to show that the facts on which the attachment was obtained are unfounded, or that the property attached does not belong to the defendant. *Quine v. Mayes*, 2 R. R. 510.

62. The sureties on a bond given for the release of property attached, the condition of which is that they shall satisfy whatever judgment may be rendered in the suit, though not parties to the action, may plead the nullity of the judgment, when called upon to satisfy it. Their undertaking was, to satisfy any judgment legally obtained. When a judgment is absolutely null, any one having the least interest in opposing its effect, may have such nullity pronounced. *Id.*

63. The formalities prescribed by art. 254 of the Code of Practice, which requires where the defendant has no known place of residence, or conceals his person, or is absent, or resides out of the State, that the sheriff shall serve the attachment and citation, by affixing copies thereof to the door of the Parish Church of the place, or to that of the room where the Court in which the suit is pending is held, stand in the place of citation, and form the basis on which all subsequent proceedings must rest, and their omission will be fatal. Service of citation on the defendant, is the first step to be taken. *Putnam v. Grand Gulf Rail Road and Banking Co.*, 3 R. R. 232.

64. The remedy by attachment is a harsh one, and those who resort to it, must comply strictly with the requisites of law. *Id.*

65. The subsequent return of a party, whose property had been attached on an affidavit that he had left the State with the intention of never returning, will not alone be sufficient ground for dissolving the writ, where circumstances render it probable that his original intention was not to return. The intention of returning should have been clearly proved, to entitle the defendant to a dissolution of the attachment. *Reeves v. Comly*, 3 R. R. 363.

66. The surety in an attachment, though a resident of a different Parish, may, under the third section of the act of 20th March, 1839, be proceeded against, summarily, before the Court by which the original suit was decided. The object of that section was to authorize the Court before which the action was instituted, to

determine all questions, principal and incidental, raised in the course of the proceedings, and thus to secure a speedy adjustment of the rights of the plaintiff. *Wallace v. Glover*, 3 R. R. 411.

67. Where plaintiff, in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case no privilege is acquired. *Fisher v. Vose*, 3 R. R. 457.

ATTORNEY.

1. Where the attorney at law makes the affidavit for an attachment, he need not State, that he is attorney in fact. *Austin et al. v. Latham*, 19 L. R. 88.

ATTORNEY AT LAW.

1. An additional sum of the fee of the attorney of an estate will not be allowed, when there is no evidence of the nature and value of the services for which it is claimed. It is not sufficient to urge that the sum claimed is a moderate fee. *Clague's widow v. Clague's executor*, 13 L. R. 1.

2. An attorney or *curator ad hoc*, appointed to represent an absent defendant, has no capacity or authority to waive prospectively in behalf of his client the production of legal evidence, and he can not bind him by agreeing to dispense with the forms required by law in taking evidence. *Edmonson v. Mississippi and Alabama Rail Road Co.*, 13 L. R. 282.

3. The authority of an attorney at law extends to all the means necessary to protect and promote the interest of his client, so far as they are affected by the proceedings in Court; but he cannot enter into an agreement with the members of the bar not to try causes for a certain time, which would be binding on his client and preclude him from having his cause set for trial by employing other counsel. *Robert & Williams v. Commercial Bank*, 13 L. R. 528.

4. An agreement among counsel that they will not try causes during the summer and early fall months, is not *legally binding* on the parties to it. If a cause afterwards set for trial by the original counsel at the instance of the client, the Court will disregard his general promise, and allow him to proceed. *Id.*

5. An attorney at law cannot be required to disclose communications of a deceased client relative to dispositions in his will.

There is no distinction between the case where a party continues to be the client of the attorney, and where he is dead. *Hart v. Thompson's executor and legatees*, 15 L. R. 88.

6. The Court should not receive evidence of the *value* of professional services, as an attorney at law, but pass on them as an expert; the services being rendered under the eye of the Court. *Baldwin's executor, v. Carleton*, 15 L. R. 394.

7. The authority of an agent of the plaintiffs, and of the attorneys, in prosecuting the original suit, is put to rest by the judgment, and cannot be questioned in a proceeding against the bail. *Opothlarholer et al. v. Gardiner*, 15 L. R. 512.

8. When it appears that the defendant is a non-resident, but has an attorney of record, service on the attorney of notice of judgment is sufficient. *Id.*

9. It is not necessary for the sheriff to call on the attorney, when the defendant is absent, to point out property; and the return of "*no property* after demand of the plaintiff's attorney" was sufficient to authorize a *capias ad satisfaciendum* to issue. *Id.*

10. Where an attorney at law appears for and represents an absentee in all the proceedings in a suit, he will be presumed to have acted through out with full authority from his client. *Hempkin v. Bowmar et al.*, 16 L. R. 363.

11. An attorney at law is competent to make the affidavit necessary (in the absence of his client) on which to obtain an attachment. *Clark et al. v. Morse*, 16 L. R. 575.

12. Where the party, whose witnesses fail to attend, is necessarily absent from the State, the affidavit of his attorney, for a continuance, may suffice; although his knowledge of the facts sworn to, is derivative. *Lizardi et al. v. Arthur & Fulton*, 16 L. R. 577.

13. In an application for a new trial, on the ground of newly discovered evidence, *in the absence of the party*, the attorney at law, conducting the suit is competent to make the necessary affidavit, when the facts are within his knowledge. *Williams v. Brashear*, 16 L. R. 77.

14. Attorney's fees are some times allowed as special damages on the dissolution of an injunction wrongfully sued out, as a punishment for the unjustifiable resort to this as a means of delay to defeat the ends of justice. *Smith v. Bradford*, 17 L. R. 263.

15. In a suit for professional services as attorney at law when no other services were rendered than aiding to draw a petition in a suit which is afterwards abandoned; the verdict of a jury disallowing the plaintiff's demand was not disturbed. *Haralson v. Camp et al.*, 17 L. R. 267.

16. An attorney at law, though entitled to a commission on the amount recovered, will be a competent witness for the plaintiff. *Burke v. Brazeale and another*, 1 R. R. 73.

17. An affidavit for a continuance on the ground of the indis-

position of the principal counsel, unaccompanied with any allegation that he was in possession of papers necessary on the trial, will be disregarded, where the circumstances of the case induce the belief that it was made for delay. *Hooper v. Hyams executor*, 1 R. R. 90.

18. The fees of counsel employed by an administrator on rendering the account of his administration, are a part of the expenses incurred, and form a correct charge against the estate; and when the account has been rendered by the administratrix of a deceased administrator, she will be entitled to claim the allowance of such fees for counsel employed by her to render the same. *Smith administrator, v. Cheney administratrix*, 1 R. R. 98.

19. The compensation allowed to counsel appointed to represent the absent creditors in cases of insolvency, is in no case to be paid by the mass of creditors. The act of 1817, which provides, that such compensation shall be at the rate of five per cent on the amount recovered for the absent creditors, to be deducted from such amount, and that it shall not exceed the sum of two hundred and fifty dollars, is not repealed by the 3164th article of the Civil Code. *Bijotat v. his creditors*, 1 R. R. 272.

20 In all cases where compensation is to be computed by a *per centage*, and no sum is realized by which it is to be borne, the compensation fails. *Id.*

21. An attorney's fee, for services in making out the accounts, and attending the defence of a suit against the succession of deceased administrator, instituted before the Court in which such succession was opened, for a balance due to the estate which he administered, cannot be charged to the latter estate. It is only when an account is regularly rendered by the representative of an estate, in the Court under whose authority it is administered, that the expense attending it, is chargeable to the estate. *Thomas, administrator, v. Bourgeat, executor*, 1 R. R. 403.

22. A contract made by the syndic of the creditors of an insolvent with counsel, to pay a certain sum for professional services for the benefit of the estate, is not conclusive upon the creditors, who may oppose the allowance, and reduce the amount, if exorbitant. Such allowance should be in proportion to the number and importance of the suits prosecuted or defended, and to the other professional services rendered; and will form a charge upon the creditors. *Girard and another v. their creditors*, 1 R. R. 455.

23. The functions of an attorney appointed by a Court of Probates to represent the absent heirs of a succession, cease whenever the heirs present themselves, or send their powers of attorney to claim their respective portion of the estate. *Succession of Morgan*, 1 R. R. 514.

24. Unless specially empowered by the husband, an attorney at law can not authorize the wife of his client to do any act for which

the authorization of the husband is required. *Gorman v. Berghans*, 2 R. R. 282.

25. The act of 22d March 1826, relative to attorneys at law, applies only where the money belonging to a client has been withheld from him. It is inapplicable, where the latter seeks to obtain the control of a note which had been received by the attorney. *Oakey v. Duncan*, 2 R. R. 349.

26. Where no special contract has been made, the compensation of advocates and attorneys must be regulated, in a great degree, by the nature of their services. The difficulties of the case, the amount in controversy, and other attending circumstances, must be considered, in connection with the physical and mental labor, and the responsibility incurred. *Hunt v. Orleans Cotton Press Co.*, 2 R. R. 404.

27. An attorney is not admissible as a witness to disclose facts, the knowledge of which he acquired confidentially, in the practice of his profession. But when in possession of papers belonging to his client's adversary, or when called on, after having had them in his possession, to disclose what he has done with them, or to point out where they may be found, the rule does not apply; and he may be as properly called on to produce the papers necessary to establish the rights of the adverse party, if still in his possession, or interrogated as to facts which may lead to their discovery, as his client himself could be. C. Practice, 140, 473. *Travis v. January*, 3 R. R. 227.

28. An agreement, by an attorney at law, to receive payment of a judgment in any thing but the legal currency of the United States, will not be binding on the plaintiff. *Dunbar v. Morris*, 3 R. R. 278.

28. On a rule upon an attorney, under the third section of the act of 27th March 1823, to show cause why an information should not be filed against him, it is the duty of the judge by whom the rule was granted, to decide as to the sufficiency of the cause shown. The act does not require that the attorney general should be notified of, or take any part in this preliminary proceeding. *State v. Judge of first district*, 3 R. R. 416.

ATTORNEY, DISTRICT.

1. The 21st section of the act of 22d February, 1817, which allows the prosecuting attorneys on behalf of the State, ten per cent on amounts collected by them, to be paid by the defendant, will not authorize the allowance of such a commission to a district attorney, who appears on behalf of the officers of the State, for the purpose of dissolving an injunction, obtained by a delinquent sheriff to stay an execution issued against him by the trea-

surer. The defence of such a suit, is one of the duties that devolves on the district attorney as a public officer. *Scarborough v. Stevens*, 3 R. R. 147.

ATTORNEY IN FACT.

1. A power to sell must be express and special. No particular form of expression is necessary, but it must distinctly express the intention of the seller, so as not to admit of equivocation or serious doubt. *Cuny v. Robert et al.*, 16 L. R. 175.

2. It is not indispensably necessary that the word "sell" be used in a power or letter of attorney to sell a slave, but there should be some thing expressed which is equivalent, or has the same meaning. *Id.*

3. A request to the judge to charge the jury that "a power to sell a slave must be *express* and *special*, and should not be inferred from circumstances," is too specially and strongly expressed; but on the other hand to tell the jury if it appeared to have been "*fairly* the intention of the party to authorize a sale," and that they might consider the sense in which the power was meant to be used, taken with the context, is too loose and indefinite. *Id.*

4. The Louisiana Code requires express and special power to be given whenever the things to be done are not mere acts of administration. *Gaienné v. Akin's executor et al.*, 17 L. R. 42.

5. A tutrix may appoint an attorney in fact to carry into effect any act of sale which she could legally execute. *Hardy, superior of the convent of Sacré Cœur v. Landry's heirs*, 17 L. R. 191.

ATTORNEY OF ABSENT HEIRS.

1. The attorney of absent heirs cannot institute a suit against the testamentary executor and legatees, to annul the will of the testator. His functions are essentially conservatory. *Mix's absent heirs v. Mix's executor and legatees*. 15 L. R. 66.

2. The attorney of absent heirs, may and perhaps generally does, represent the legatees named in the will, when any of them are absent; hence, the absurdity of his suing to annul the will, and with it, their legacies. *Id.*

3. The attorney of absent heirs can not interfere with the person or share of an estate coming to a minor heir, while he is under the direction and care of a tutor. *Percy, tutor, &c. v. Provan's executor*, 15 L. R. 69.

4. It is not necessary, *in all cases*, to appoint an attorney of absent heirs, and a curator to the vacant estate, contradictorily

with whom the heir must claim the estate; and when it is shown the deceased had no forced heirs, the nearest collateral relation, as a brother, applying, will be entitled to the succession. *Addisson v. New Orleans Savings Bank*, 15 L. R. 527.

5. The absence of heirs will not be *presumed* in all cases of an intestate succession, and less so in a case where the contrary is shown. *Id.*

6. An attorney of absent heirs, or a defensor appointed by the Court to defend the rights of absentees, in a suit against them, ought not to be permitted to surrender any lawful means of defence on their part, to the injury of those he represents. *Collins v. Pease's heirs*, 17 L. R. 116.

7. And where from want of skill or inexcusable neglect on the part of a defensor, by consenting to the introduction of improper testimony in favor of the adverse party, &c., it will form a proper case for the application of the law, authorising this Court to remand causes to be tried *de novo*, when in its opinion justice requires such a measure. *Id.*

AUCTIONEERS.

1. Auctioneers are public officers, and in making public sales, are bound to have from the seller or owner of the property the terms and conditions in writing, which they are to proclaim in a loud and audible voice to the by-standers, and to offer the property publicly for sale. *Baham v. Bach*, 13 L. R. 287.

2. From the time the auctioneer declares the highest bidder to be the purchaser, and the thing sold is adjudicated to him, the contract is subjected to the same rules which govern the ordinary contract of sale. *Id.*

3. Combinations at auction sales to enhance the price by false bids, or depress it by false assertions, are artifices which invalidate the contract, when practised by those who are parties to it. *Id.*

4. The owner of property may withdraw it before the highest bid is accepted by the auctioneer, but he has no right to bid himself, unless he publicly reserves this right; still less can he bid through the auctioneer. *Id.*

5. So, where the price of property was limited, which fact was not communicated to the bidders, and the auctioneer advanced on the bid until it reached the limits prescribed by the owner, and was adjudicated to the defendant: *held*, that the sale was null and void, even as to the purchaser. *Id.*

AUCTION SALES.

1. Where the terms of an auction sale are changed, or new conditions imposed, from those advertised, by proclaiming them at the stand at the commencement of the sale, the purchaser is not bound by them, and a re-sale can not be made at his risk. *Nott & Co. v. Oakey et al.*, 19 L. R. 18.

2. A purchaser at the first sale, declining to comply with a new condition not published in the auction bills, but proclaimed at the stand by the auctioneer, is at liberty to bid and become a purchaser at the second sale, without regard to his first sale. *Id.*

3. Purchasers at auction are not bound by new conditions proclaimed verbally from the stand by the auctioneer, different from or more onerous than those advertised in the auction bills. *Nott & Co. v. Bank of Orleans*, 19 L. R. 22.

 AUDITOR.

1. Where by consent of the parties, the case is submitted to an auditor, with the powers of an amicable cempounder, his award cannot be opened by the Court, but must be homologated as it stands, having the effect of a definitive judgment. *Deneufbourg v. Gaienné*, 14 L. R. 53.

 AUDITORS.

1. Where an auditor has been appointed, when he commences his proceedings, the first act is to take the oath, which must be in writing at the foot of the order of Court, and annexed to his report. *Locke & Co. v. Dakin & Dakin*, 15 L. R. 423.

2. In all cases, whether the auditors have been specially requested or not, by the party, they must be sworn, and must give notice to the adverse party. *Id.*

3. The circumstance, that an auditor made his report without taking the oath, but swore to it before homologation, is insufficient to cure the defect. Had the auditor taken his oath at any time before completing his business, it would be sufficient. *Id.*

4. The party objecting to the report of auditors ought to state all the objections at once; a contrary practice of filing several successive oppositions is inconvenient and embarrasses rather than facilitates the administration of the law. *Harrison et al. v. Faulk*, 16 L. R. 358.

5. Auditors should state in their report the articles in the accounts, detailing the steps by which they arrived at the result. *Id.*

6. The report of auditors should be signed by all of them before it is made in Court. They are *functi officii* after their report has been made. *Harrisson et al. v. Faulk*, 16 L. R. 358.

7. The Court may receive evidence on the trial of an opposition to the report of auditors, independently of their proceedings and report, on which, if sufficient to justify it, a judgment may be rendered, disregarding the report altogether. *Id.*

BAIL.

1. Where a bail bond is taken in pursuance of an order of Court; the entry on the minutes requiring bail in seven hundred dollars, and the bond is taken in the penalty of seven thousand dollars; and the judge at a subsequent term, corrects and alters the minutes to seven thousand dollars: *held*, that the bond is not thereby invalidated; and the sureties can only be relieved on the score of error in signing, which does not result from altering the minutes, whether done legally, or illegally. *State v. Frith et al.*, 14 L. R. 191.

2. The sureties in a bail bond are not entitled to an *exoneratur*, when they have made no formal surrender of the principal; even if he be confined in prison for a subsequent offence, not bailable, and afterwards makes his escape. *Id.*

3. So, also, bail are not exonerated when they have made no surrender of the principal: even where the sheriff and constable both resign; for these officers are required to act until their successors are appointed. *Id.*

4. The fact that the *ca. sa.* was returned two days before the return day, is not material in a proceeding against the bail, when the rule on him to pay the judgment was not taken until the return day, and full notice given before trial on it. *Opothlarholer et al. v. Cardiner*, 15 L. R. 512.

5. Where the principal debtor was surrendered to the sheriff on the twenty-third, and final judgment against the bail bears date the 18th of January, five days previous, the surrender comes too late to operate a release of the bail. *Id.*

6. Judicial bonds taken by the sheriff from persons in his custody, must be drawn in the manner authorized by law; any clauses that are superadded will be rejected, and those omitted supplied. *Slocomb et al. v. Robert*, 16 L. R. 173.

7. So, the surety in a bail bond may be relieved at any time by surrendering the principal debtor to the sheriff before judgment, notwithstanding the tenor of the bond is different. *Id.*

8. Bail are not entitled to notice of a *fieri facias*, or *capias ad satisfaciendum*, issued against their principal. *Valentine v. Christie*, 1 R. R. 298.

9. No proof will be required of the signatures to a bail bond, taken and attested officially by a justice of the peace. *The State v. Boisseau and others*, 1 R. R. 388.

10. When a bail bond has been executed by filling up a printed form, interlineations made in consequence of want of space to contain all the necessary writing, will be considered as sufficiently accounted for. *Id.*

11. All bail not fixed with the debt before the passage of the act of the 28th of March, 1840, to abolish imprisonment for debt, were discharged by that act. *Frey and another v. Hebenstreit and another*, 1 R. R. 561.

12. The 19th section of the act of 10th February, 1841, cannot revive the responsibility of bail previously discharged by the act of the 28th of March, 1840. *Id.*

13. The condition of a bail bond, that the defendant shall not depart from the State without the leave of the Court, is modified by the provision of article 230 of the Code of Practice, that one who has become surety that another shall not depart from the State, or leave the jurisdiction of the Court by which the order of surety was granted, may be discharged from all responsibility by surrendering to the sheriff the person of the debtor. *Id.*

14. Bail will be discharged, where the surrender of the debtor becomes impossible by the act of God, as in case of death of the debtor; or is rendered vain and useless by the act of the law, as in case of the abolishment of imprisonment for debt. *Id.*

15. One who becomes bail for another, on a guaranty from a third person to indemnify him for any loss he may be subjected to, in consequence, is under no obligation to notify the latter of any steps taken to render him liable. *Fisk v. Comstock*, 2 R. R. 25.

16. Bail may coerce the surrender of their principal. *Id.*

17. The act of 28th March 1840, abolishing imprisonment for debt, by relieving bail from the obligations they had entered into, deprived them of any right over their principal. *Ex parte Lafonta*, 2 R. R. 495.

18. Bail may arrest the principal out of the State in which the bail bond was given, and even after the latter has obtained a stay of proceedings. *Id.*

19. Bail, when authorized to arrest the principal, may obtain, on the production of the bail piece, the assistance of a sheriff or constable, or an order from a Court or magistrate, to arrest such principal. *Id.*

20. Where the condition of a recognizance is, that the principal shall appear at Court to answer such matters and things as may be objected against him on behalf of the State, and shall not depart the said Court without leave thereof, and no formal surrender has been made of him to the sheriff by his sureties, and the accused effects an escape from the Court room while the jury are deliberating on his case, the recognizance will be forfeited, his sureties

might have released themselves at any time, by a surrender of their principal, but until manifesting, by an actual surrender, their intention to be no longer bound, the principal remained in their custody, notwithstanding his appearance in Court. *State v. Martel*, 3. R. R. 22.

21. Whenever a question arises out of a bail bond, it is incidental to the main action, and may be tried summarily, without instituting a new suit. *Wallace v. Glover*, 3 R. R. 411.

BAIL BONDS.

1. On the failure of the accused to appear when called on the second day of the term, judgment *nisi* only is to be entered, which may be *set aside* during the same term on the appearance of the party accused. *State v. Cotton*, 19 L. R. 550.

2. So were a party accused and his sureties failed to appear on the second day of the term and a judgment was entered up against them; and afterwards, but during the term, the principal surrendered himself: *Held*, that the judgment should have been set aside on his appearance in Court. *Id.*

BAIL AND BAIL BONDS.

1. A return by the sheriff, that he seized in the hands of W. B. all the rights, credits, &c., and property of every kind which he might have in his possession or under his control, belonging to the defendant sufficient to satisfy the writ of *fiери facias*, of which seizure nothing came into his hands; *no other property found; is insufficient to authorize the issuing of a capias ad satisfaciendum.* *Conway v. Jones et al.*, 17 L. R. 413.

2. It is required before a *capias*, issues, that demand shall be made by the sheriff of the parties, first of the defendant and then of the judgment creditor to point out property and *all in vain.* *Id.*

3. To enable the judgment creditor to proceed against the surety in a bail bond, or against bail, the sheriff's return on the *fiери facias* must state that he found no property to seize, notwithstanding the demand made of the parties. *Id.*

4. Proceedings on bail bonds when the sureties are sought to be made liable, are to be tried summarily and without the intervention of a jury. *Weyman & Thorn v. Cater & Cropp*, 17 L. R. 529.

5. So sureties in a bail bond have the right to proceed by rule, taken on the adverse party, to show cause why the bond should not be cancelled, and the sureties discharged. *Id.*

6. Whenever a question arises out of a bail bond either to

enforce its payment or to destroy the surety's liability, such question is incidental to the main action, and may be tried summarily without a new suit. *Conway v. Jones et al.*, 17 L. R. 413.

BANK.

1. A bank employing its regularly appointed notary to protest a note deposited with it for collection, will not be liable for his official misconduct, or failure to give notice to the endorsers. *Frazier v. New Orleans Gas Light and Banking Co.*, 2 R. R. 294.

2. The third section of the act of 14th March, 1839, requiring the banks in the city of New Orleans to settle and pay in gold and silver the balances due to each other, every Monday, imposed no duty not previously required by law; and if the party in whose favor it was stipulated choose to waive the right, the State cannot complain, without showing some injury resulting therefrom to the community. *State v. New Orleans Gas Light and Banking Co.*, 2 R. R. 529.

3. Since the act of 14th March, 1839, relieving the banks of this State from the forfeiture of their charters occasioned by their suspension of specie payments, no bank can suspend specie payments, even for a day, without exposing its charter to forfeiture. *Id.*

4. When the rate of interest to be charged by a bank on loans or discounts, is limited by its charter, it cannot stipulate for a higher rate on the amount of any loan or discount, in consideration of its forbearance to sue. *Exchange and Banking Co. of New Orleans v. Boyce*, 3 R. R. 307.

5. The act of incorporation of a banking company provided that its capital should be divided into shares of one hundred dollars, of which five dollars should be paid at the time of subscribing for the stock, and the residue in such instalments, and at such times, as might be required by the directors. Fifty dollars on each share were called in, and paid. A resolution, subsequently adopted by the directors, provided, "that any stockholder who shall pay in anticipation a part, or the full amount due on the stock held by him, shall be entitled to dividends thereon in proportion to the amount so paid in." Under this resolution, a stockholder paid up the whole amount due on the stock held by him, and received dividends thereon, and loans (*less however, than the amount so advanced by him*) upon the pledge of it. The bank having gone into liquidation, required the re-payment of the loan and refused to call for further contributions from the other stockholders. An action was commenced by the stockholder who had paid in full against the bank, to compel the calling in of the whole amount subscribed, or, in default thereof, or in the event of the inability of the stockholders

to pay the balance due, to recover the amount paid by him beyond fifty dollars on each share, with interest on the over-payment, and to restrain the company, from exacting re-payment of the loan made to him, until the stockholders should be placed on an equality as to their payments. The Bank, thereupon, sued on the notes given for the loan. On appeal from a judgement rendered in the two actions, which had been consolidated; *held*, that no stockholder can be liable for more than one hundred dollars on each share held by him, and that each share must lose an equal amount on the final liquidation of the bank. That if the whole capital be sunk, those who have paid but fifty per cent will be debtors for the balance, and those who have paid in full cannot be called on for more. That if but half have been lost, the former are no further liable, but a balance will be due to the stockholder who has paid in full. That the payment of the whole amount of the shares under the resolution of the directors, did not change the relative position of the stockholders to each other as partners, except as to the dividends, the one having merely anticipated the payment of all he could ever be called upon to pay, and the others remaining liable for the balance of their subscriptions. That the payment was under the tacit condition that, if the concern proved profitable, the party so paying should receive dividends in proportion to the amount paid by him, and on the winding up of its business, after payment of the debts from the surplus profits, the whole amount so paid in; and, if not profitable, that he should lose only the same proportion, upon each share, as the other stockholders. That *quoad* the creditors of the bank, the excess above fifty per cent so paid is capital, liable for its debts; but that, as among the stockholders, the party who made the advance is a creditor to the extent of the surplus, and entitled to interest thereon from the time when the bank ceased its operations. That the stockholders are liable for the whole amount of their subscriptions, and that, if any further payment beyond fifty dollars on each share be necessary to the discharge of the debts of the company, it will be the duty of the directors to call on all the stockholders for an equal contribution; and that it would be unjust to use the amount paid by one stockholder, beyond the others, for that purpose. That the bank having gone into liquidation, a stockholder may maintain an action against it; and that the loan, being less than the amount advanced by the borrower beyond the other stockholders, may be retained by him, unless required for his proportionate contribution towards the payment of the debts of the company. *Millaudon v. the New Orleans and Corrollton Rail Road Co.*, 3 R. R. 488.

BANKS.

1. Where part of the directors of a bank exclude one of their

number from the privilege of examining the discount book, to which all the rest have access, on the ground that he is hostile to the institution, and will use the information he may obtain to its injury, a mandamus will lie to enforce the right, which is essential to the discharge of his duties as a director. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

2. Every note issued by a bank, promising to pay a given sum on demand, is a distinct and separate promise. *Bartlett v. New-Orleans Canal and Banking Company*, 1 R. R. 543.

3. The neglect or refusal of a bank to pay its notes in specie is only a *passive* violation of its contracts; and the mere announcement of its intention not to pay notes in specie, by a resolution suspending specie payments, cannot, consequently be considered an *active* violation of its contracts. *Id.*

4. The bank of Tennessee, at Nashville, and its branches, form only one corporate body, under the name of the bank of Tennessee. The branches are not empowered to issue notes, or to sue or be sued; and any property of the bank will be liable for notes issued under the authority of the principal bank, though payable at one of the branches. *Trezevant v. Bank of Tennessee*, 1 R. R. 465.

5. By the charter of the City Bank of New-Orleans, the transfer book, and the minutes of the proceedings of the board of directors, are the only books to be kept. The latter is only open to the inspection of the stockholders during one month in each year; as to the former, the charter is silent. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

6. The penalty, provided by the twentieth section of the charter of the New-Orleans Canal and Banking Company, which declares that if the company shall suspend or refuse to pay any of its notes, deposits, or other obligations in specie, that the party may recover interest at twelve per cent a year from the time of such suspension or refusal, cannot be recovered without a demand and failure to pay on the part of the company; and such interest can only be recovered from the time of the demand and failure. *Bartlett v. New-Orleans Canal and Banking Company*, 1 R. R. 543.

BANK DIRECTOR.

1. The provision in the charter of the Louisiana State Bank that two thirds of the six directors on the part of the State, and two thirds of the twelve elected by the stockholders, only shall be re-appointed and re-elected *annually*, applies to each class separately; so as to obtain an annual renewal of one third of the whole board. *Jordy v. Hebrard et al.*, 18 L. R. 455.

2. The restriction in the charter confines the re-appointment and re-election to two thirds of the former board; and directors

formerly appointed by the Governor and left out, are ineligible to come in as new members, elected by the stockholders. *Jordy v. Hebrard et al.*, 18 L. R. 455.

3. If a director is *ejected as ineligible*, the next highest on the list voted for but left out, is not entitled to his seat. A new election must take place. *Id.*

BANKRUPTCY.

1. The object of the act of Congress of the 19th August, 1841, establishing a uniform system of Bankruptcy, was, while it released the debtor, to distribute the proceeds of his property as equitably as possible among his creditors, due regard being had to the nature of the different contracts and liens affecting it. *Fisher v. Vose*, 3 R. R. 457.

2. Where a party to a suit pending before a State Court, applies to be declared a Bankrupt under the act of Congress of 19th August, 1841, the proceedings must be suspended, for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in Bankruptcy is pronounced, the Bankrupt, in relation to all actions for and against him, except such as the statutes prescribes, is legally dead, and can only be represented by the assignee. *Id.*

3. Where plaintiff, in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a Bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case, no privilege is required. *Id.*

BATTURE.

1. The right to future alluvial formation or batture is a vested right inherent in the property itself and forms an essential attribute of it; resulting from natural law in consequence of the local situation of the land to which it attaches. *Municipality No. 2 v. New Orleans Cotton Press*, 18 L. R. 122.

2. Cities may acquire *jure alluvionis*, but it must be as owner of the front or as riparian proprietor; for the alluvion is but an accessory to the principal estate or land. *Id.*

3. There is nothing in the Roman law which restricts the right of alluvion to particular localities or portions of land, having particular names; but the right depends on the question whether the land had fixed and invariable limits, or a natural boundary on one

side by a water course. *Municipality No. 2 v. New Orleans Cotton Press*, 18 L. R. 122.

4. The Jesuits' plantation out of which the *locus in quo* arises was originally entitled to the alluvion or batture on its front. The mere act of incorporation of the city in 1805, changing the name of this property from *rural* to *urban*, neither made the city a front proprietor so as to acquire *jure alluvionis*, or deprive the front lots of the right to such accretion. *Id.*

5. The onus or burden consequent on the right of alluvion is natural, not civil; it is a risk arising from the exposed situation of the land, not the expense of making embankments; for the right of alluvion exists on streams which do not over-flow. *Id.*

6. The public through the agency of the corporation has the sole use of the levee and bank of the river; and the front proprietor cannot extend the levee without the consent of the corporation, which in the mean time has the right to make all improvements for rendering it useful to the public and favorable to commerce. *Id.*

7. The French government in laying out the ancient city of New Orleans, left an open space between the front row of houses and the river, marked *quai* on the plan, which was a dedication of this space to public use, and it became thereby a *locus publicus*. *Id.*

8. If in laying out the faubourgs, the ancient proprietors of those riparian estates had left an open space between the front street and the river, marking it as public place on the plan, it would have amounted to a dedication if accepted by the public. *Id.*

9. But none of the plans show any indication of madam Delord and her vendees, having ever dedicated the front of her property on the river to public use; on the contrary, she continued to exercise acts of ownership as a riparian proprietor, and was required by the city ordinances of 1830 to keep up the levee in front as such. *Id.*

10. Garland, J. the right of alluvion is not based exclusively on the principle of being subject to the expense and burden of keeping up roads and levees. The Roman jurists say it is a mode of acquiring property by natural law; that it is just, the advantages of the thing should belong to him who supports its disadvantages. *Id.*

11. The plan of madam Delord leaving an open space between New Levee street and the river, was not a dedication of this space to public use. There was nothing marked or written on it indicating an *intention* so to dedicate it. *Id.*

12. There is no particular form necessary to a dedication of land to public use. But it requires the assent of the owner and the fact of its being used for the purposes intended. *Id.*

13. Martin, J. dissenting. Where the plan of a city or faubourg fronting on a navigable river or the sea, has an open space between the front row of houses, or street, and the water, it becomes part of the port; and it is a *locus publicus* dedicated to public uses.

without any other designation whatever. *Municipality No. 2 v. New Orleans Cotton Press*, 18 L. R. 122.

14. The batture which formed in front of the faubourgs of the city of New Orleans, after their incorporation with the city, became the property of the city and not of the front proprietors *Id.*

15. In countries governed by the civil law, the ports or landing places of cities situated on navigable rivers, lakes or the sea, are *loci publici* in which individuals have no right of property. *Id.*

16. The plans of faubourgs Delord and Saulet, laying off these plantations into city lots and squares divested the owners of all interest, except in the lots and squares sold to individuals, &c. All the rest was dedicated to the public. The land or space between New Levee street and the river became a *locus publicus* destined to the public use. The dedication required no further evidence than the plan and the use of these places by the public. *Id.*

17. The use of the batture out side of the levee is vested in the public; but the ownership or title to the soil is vested in the front proprietors of lots, or land to which the batture attaches or forms. *Pulley & Erwin v. Municipality No. 2*, 18 L. R. 278.

18. The Corporation or Municipality is the administrator of the batture for the use of the public, out side of the levee; and have the right of taking earth for the construction of wharves for the public use on the batture, along its whole extent within the corporate limits of the city; and also for improving the port and the streets and avenues leading to it. *Id.*

BILL OF LADING.

1. Where the plaintiff purchased certain cotton, and made advances on the bill of lading; and the cotton was delivered to the defendants, under a previous contract with the seller, before the bill of lading came to the possession of the plaintiff, he cannot recover the cotton. *Hepburn v. Lee & Hardy et al.*, 14 L. R. 76.

2. The bill of lading can have no effect until its delivery; and, at the time, the cotton being in possession of the defendants, under a previous contract, having no privity or connection with the one under the bill of lading; they were in no way responsible. *Id.*

3. The possession of a bill of lading, like that of a bill of exchange, is *prima facie* evidence of title; and, in the absence of contradictory evidence, will entitle an intervening claimant to bond property seized by attachment. *Park v. Porter*, 2 R. R. 342.

BILLS AND NOTES.

1. The possession of a promissory note, endorsed in blank, is *prima facie* evidence of property, sufficient to throw the burden

of proof on the defendant; and when the signature is not denied, the plaintiff is not bound to make proof of it. *Burns v. Haynes et al.*, 13 L. R. 12.

2. The certificate of protest of the notary, is required to make mention of the demand and of the manner of *making it*, and is evidence of the matters it contains; but is not *evidence* of the acknowledgement of the party, to pay the debt in a particular description of notes. *Maccoun v. Atchafalaya Bank*, 13 L. R. 342.

3. An endorser cannot attach property of the maker of a note not yet due, on the ground that he endorsed as surety, and that the latter is about to remove with his property permanently from the State, before the note comes due. *Taylor v. Drane*, 13 L. R. 62.

4. The maker of a note has an interest to show, that his vendor handed it over to the payee and endorsers, to sue as a *bona fide* holder, and deprive him of his plea of failure of consideration. He has a right to interrogate the plaintiff on oath, if he is the true owner, and to have the case remanded for this purpose, if it has been refused. *Phillips v. Carr*, 13 L. R. 71.

5. Where defendant sets up an equitable defence to his note, and charges fraud in the transfer of it to the plaintiff, to deprive him of his defence, the burden of proof of consideration, and that he came fairly by it, rests on the latter. The *form* of transfer makes no difference, whether by blank or special endorsement. *Morgan v. Yarborough*, 13 L. R. 74.

6. Where an order or draft is drawn upon a general or particular fund *for part only*, it does not amount to an *assignment* of that part, unless the drawer consents to the appropriation by the acceptance of the draft. *Poydras v. Delamare et al.*, 13 L. R. 98.

7. In an action for the recovery of a lost note, when the fact of the loss is proved, the defendant must show that he came in possession of it in the regular course of trade, and that he acquired it in good faith and for a valuable consideration. *Nicholson, tutor, &c. v. Patton*, 13 L. R. 213.

8. When a note is taken by a broker under circumstances affording reasonable grounds of suspicion, he should inquire if the party came by it honestly; and if he takes it under these circumstances, with a view to his profit, it is at his own risk. *Id.*

9. The plaintiff may strike out his own endorsement on the bill at the trial. *Banks v. Brander et al.*, 13 L. R. 274.

10. The acceptor of a bill is bound absolutely, and the holder is not required to sue the drawer or endorsers. *Id.*

11. Bills of exchange, payable *after date*, are not required to be presented for acceptance, as between the holder and endorsers; it is only necessary to have bills payable *after sight*, presented for acceptance to give them a date. *Crosby v. Morton et al.*, 13 L. R. 357.

12. Endorsements made by a partnership on a bill of exchange, bearing date, about three weeks before the dissolution of the firm,

will be presumed to have been made during the continuance of the partnership. *Crosby v. Morton et al.*, 13 L. R. 357.

13. Where certain notes payable at the branch of the United States Bank at Natchez, are protested by a notary, residing at Natchez, who states in his protest, that he demanded payment at the United States Bank, it will be considered as meaning the branch at Natchez, and not the principal bank at Philadelphia. *Thatcher v. Goff et al.*, 13 L. R. 360.

14. The holder of a note endorsed in blank, may institute a suit in his own name, whether he be the true owner, or the note has been put into his hands for collection. *Boswell v. Zender*, 13 L. R. 366.

15. A note endorsed in blank, cannot be distinguished from one payable to bearer, which may be put in suit by any one in possession, where there are no allegations that it was lost or stolen, or that the possessor came by it unfairly. *Id.*

16. Where an endorser of a bill has not received notice of protest, but afterwards acknowledges that he is bound, and promises to pay, with full knowledge of the irregularity and want of notice, he will be held able. *Bank of the United States v. Ellis*, 13 L. R. 368.

17. An acceptance for accommodation of the drawers of a bill of exchange, is essentially a credit given to them, and they cannot be made liable to the suit of the acceptors, before maturity or payment of the bill. *Groning et al. v. W. & L. Krumbhaar*. 13 L. R. 402.

18. The obligation of a drawer of a bill is fixed by the non-acceptance, protest and notice; and it is immaterial whether any demand and protest for non-payment was made or not. *Williams v. Robinson*, 13 L. R. 419.

19. A subsequent promise to pay a bill or note, or a part payment thereof, must be made with a full knowledge of the fact of a want of due diligence on the part of the holder, in giving notice of protest to the parties, in order to be binding; but affirmative proof of this knowledge is not required, it may be inferred from circumstances. *Id.*

20. Bank notes when presented at the bank, and payment is refused, become mere evidence of debt, fluctuating in value according to the credit of the bank, and are fit objects of trade and commerce. Trading in them is not putting them in circulation *anew*, so as to do away with the original demand and the effect of non-payment. *Id.*

21. Damages allowed of the return of protested bills, include all charges, such as premium, costs of protest and postage. The holder cannot claim *the difference of exchange*, but he is entitled to interest on the damages from the date of protest. *Robert & Williams v. Commercial Bank*, 13 L. R. 528.

22. Where a note is in possession of the payee at his death, although inclosed by him in a letter with directions to hand it over to a creditor afterwards, it will be considered as still belonging of right to his succession. *Rash v. Johns & Co.*, 14 L. R. 46.

23. The makers of a note may plead, in compensation against the endorser or holder, any demand or claim which they had against the payee at the time of its transfer. *Rash v. Johns & Co.*, 14 L. R. 46.

24. There is no necessity for any demand, or protest for non-payment of a bill, when the non-acceptance by the drawees, and protest and notice to the *drawer*, fixes *his* responsibility. *Pecquet & Lacroix v. Mager*, 14 L. R. 74.

25. Foreign bills returned with legal protest, entitle the holder to twenty per cent damages, under the statute. *Id.*

26. Where a notary makes diligent search, and uses all diligence to obtain information of the residence of the endorser in vain, he is then fully justified in putting the notice in the post-office, although the endorser may actually reside in the city at the time. *Vigers & Co. v. Carlon, f. m. c.*, 14 L. R. 89.

27. Where a note is made payable at a certain place, payment must be demanded *there*, before a recovery can be had against the sureties in the note. *Fort v. Cortes et Le Place*, 14 L. R. 180.

28. It is not sufficient to show that the sureties had no funds in the place of payment to meet the note at maturity, in order to charge them; for it is incumbent on the maker, and not on them, to provide funds at its maturity. *Id.*

29. The sureties in a note may oppose to the action all the exceptions allowed to the maker and which are inherent to the debt. *Id.*

30. Where the notary certifies that "notice of protest was served on the endorsers by letter delivered to them personally by L." &c., it is insufficient. The notary cannot certify what was done by another, so as to bind the endorser. *Shepherd v. Jonti et al.*, 14 L. R. 246.

31. A simple denial of the plaintiff's right to sue as the holder of a negotiable note or instrument, cannot authorize the maker to contest his title to it, when he holds by a blank endorsement, unless it has been lost or mislaid. *McKinney v. Beeson's estate*, 14 L. R. 254.

32. In a suit against the maker of a note, it is no ground of defence that it was improperly transferred by the curator of an estate to which it belonged, to the holder, when it is endorsed in blank. *Id.*

33. The vendor of personal property may produce evidence to show that the note sued on was given for *the price of certain furniture*, to enable him to enforce his privilege against it in the hands of his vendee. *Polo & Tivilier v. Natili et al.*, 14 L. R. 260.

34. Where the defendants are interrogated as to the consideration of the note sued on, and neglect to answer, their silence must be taken *pro confessis*, and it will be deemed full proof. *Id.*

35. According to a statute law of Mississippi, all notes made there are subject to every equitable defence, against a *bona fide*

endorsee, which could be set up against the payee; and when sued on here, the case must be governed by *the lex loci contractus*. *Barrett v. Walker*, 14 L. R. 303.

36. The general rule is well settled that when a promissory note is made payable at a particular place, a recovery cannot be had on it without proof of a demand at the place of payment. *Allain & Tremoulet v. Lazarus*, 14 L. R. 327.

37. There are exceptions to the general rule, and by the commercial law it is not necessary for the payee to prove a demand of the acceptor of a bill in order to recover of *him*. *Id.*

38. So, where the payee is in possession of a note, the burden ought to devolve on the obligor, or maker, to show a readiness and offer to pay, or funds placed in the hands of the payee for that purpose, in order to exonerate himself. *Id.*

39. It is necessary to allege and prove the endorsement by the payee of a draft, in order to entitle the holder to recover. *Nott et al. v. Brander et al.*, 14 L. R. 368.

40. Where a note is made payable at the counting-house of A, and the firm is changed to A B, before the note becomes due, a demand at the counting house of A B will be good. *Sanderson v. Oakey et al.*, 14 L. R. 373.

41. The possession of a promissory note together with the receipt, showing it had been endorsed to an other for collection, is evidence of its re-transfer, so as to authorize the holder to sue as owner. *Waring v. Crawford*, 14 L. R. 376.

42. A receipt given by the person to whom a note was endorsed for collection, is admissible in evidence to show the nature of the endorsement, and that the plaintiff did not part with his interest in the note. *Id.*

43. Where a party to a bill, or note, puts his name on it, he is presumed to have done so as surety, unless this presumption is destroyed by other circumstances appearing. *Lawrence & Hill v. Oakey et al.*, 14 L. R. 386.

44. But where the endorser's names appear first on a bill, although not the payees, and no explanatory evidence is offered, their endorsement will be considered as a direct and positive undertaking on their part, and not conditional. *Id.*

45. By endorsing a bill not payable to their order, the defendants became guarantors of its punctual payment at maturity. *Id.*

46. The certificate of the notary is *prima facie* evidence of a demand on the maker of a note; and that it was made at his domicil, although it be not so set forth in the petition. *Poydras v. Bell*, 14 L. R. 391.

47. A *certified copy* of the notarial protest, and certificate of notice, to the endorsers, &c., is sufficient evidence of the protest and notice to the endorser. *Whittemore v. Leake & Howell*, 14 L. R. 392.

48. Where the endorser lived seven or eight miles from town,

notice of protest put in the post office, addressed to him, as of that parish and town, being the place where he received his letters, was held sufficient notice. *Wittemore v. Leake & Howell*, 14 L. R. 392.

49. The defendant was sued on his promissory notes, given for a number of *city bonds*, payable in twenty years, with six per cent interest, in semi annual dividends, which being accidentally *lost or destroyed*, he asked for new ones, or a rescission of the contract: *held*, that he could demand neither; but was bound to pay his notes, as the *loss of the bonds* did not diminish the city's obligations to pay them and the accruing interest as it became due. *Mayor et al. v. Caldwell*, 14 L. R. 499.

50. The transferee of a note *not endorsed*, but transferred by a special assignment of the payee, written on the back of it, cannot maintain an action against the transferor. *Martin v. McMasters*, 14 L. R. 420.

51. The transferor is only responsible for the *existence* of the debt, at the time the note is transferred. *Id.*

52. Where the transferor of a note obtained the temporary possession of it, and tortiously added the words, *without recourse*, to the written assignment, as it did not alter the legal obligation of the parties, the Court is not bound to notice it. *Id.*

53. The certificate of the notary who makes the protest, is *prima facie* evidence that due diligence was used to find the residence of the maker and endorser of a note, and that notice to the endorser was put in the post-office. *Delavigne v. Arnet*, 14 L. R. 437.

54. The nature and degree of diligence used to find the residence of the parties to a note, and make demand and give notice to the endorser, may be inquired into on the trial, to rebut the presumption arising from the notary's certificate. This presumption will, however, yield to the contrary proof. *Id.*

55. Notice to an endorser, left at his office with a clerk, he not being in, is sufficient to render him liable. *Edson v. Jacobs*, 14 L. R. 494.

56. The maker of a note cannot complain, that demand of payment was made after the last day of grace. *Union Bank v. Mortee*, 14 L. R. 539.

57. A protest signed by the notary in the *presence of two witnesses* is sufficient, and is properly admitted in evidence. *Bank of Louisiana v. Watson*, 15 L. R. 38

58. Notices of protest, deposited in the principal post-office, where the defendant receives his letters and papers, although there is another in the same Parish nearer to him, is sufficient. *Id.*

59. The statute of 1827 in relation to protests and notices, introduced few, if any, rules derogatory to the commercial law. It only provides new modes of proof of demand, and notice to the parties to notes and bills of exchange, leaving their effect to be determined by the commercial law. *Jones v Mansker*, 15 L. R. 51.

60. The rules laid down in the Code of Practice, in relation to

the service of citations, have no application to the service of notices of protest of bills and notes. *Jones v. Mansker*, 15 L. R. 51.

61. A notice of protest, left at the defendant's store with his clerk, or on his desk, or thrust under his door during business hours, is sufficient to bind him as endorser. *Id.*

62. Notice of protest delivered *at the store* of the defendant, without stating with whom, is sufficient to bind him as endorser. *Bank of Louisiana v. Mansker et al.*, 15 L. R. 115.

63. Notice of protest left at the office of the defendant, *he not being in*, is sufficient to bind him as endorser. *Commercial Bank, v. Gove*, 15 L. R. 113.

64. Where an endorser at maturity of the note, writes on its back "I hereby waive the formality of protest, and hold myself equally bound," he will not be entitled to any further notice of its dishonor. *Carmena v. Mix*, 15 L. R. 165.

65. The holder of a note who endorses it in blank, gets it discounted and takes it up at maturity, is subrogated to the rights of the Bank against the maker. *Millaudon v. Colla*, 15 L. R. 213.

66. Payment to a Bank, like that to an individual, may be proved by parole. *Id.*

67. The law is well settled, that a presentment for payment at the place where a note is made payable, must be made within the business hours, according to the usages of the place of payment. *Wallace et al. v. Gwin*, 15 L. R. 223.

68. So where a note was made payable at the "Mechanics' and Traders' Bank," but was deposited in the Canal Bank for collection, and not presented during banking hours, and no attempt to demand payment until after the usual banking hours: *held*, that the endorser was thereby discharged. *Id.*

69. The plea of the general issue dispenses with proof of the signature of the maker, but not of the payee and first endorser. *Florance v. McFerlane*, 15 L. R. 231.

70. In an action against the maker of a note, payable at a particular place, it is necessary to show, presentment and demand at the place of payment, to entitle the holder to recover. *Hamer et al. v. Johnson; Arcueil et al. garnishees*, 15 L. R. 242.

71. The Supreme Court of the United States (*Wallace v. McConnell*, 13 Peters 136) *held* that it is not necessary to allege and prove a demand of payment, in an action against the maker of a note or acceptor of a bill; but that it is matter of defence, if the defendant can show he was ready at the place of payment, and offered to pay, to be pleaded and proved on his part. This Court adheres to its former and contrary decision, in the case of *Mellon v. Crogham*, 3 Martin N. S. 423. *Id.*

72. Where notes for the price of bank stock are renewed, and the plaintiff's agent endorses them, gets them discounted in Bank, and at maturity takes them up for his principal, they return with a subrogation to all the privileges; and the original holder can

recover and enforce his privilege on the stock, against the maker and his vendee. *Saul v. Nicholet's executor*, 15 L. R. 246.

73. When the plaintiff, by a special endorsement, parts with his interest to another, he must show title by a re-transfer. Mere possession of the note is not sufficient. *Hart et al. v. Windle*, 15 L. R. 265.

74. Where the endorsee is merely the agent of the plaintiff, the latter may sue in his own name: but such fact cannot be presumed; it must be alleged and proved. *Id.*

75. So, in this case, it was alleged that the special endorsement of the plaintiff to G, was for the purpose of collection; but the fact was not proved, and the presumption resulting from possession, is insufficient. *Id.*

76. Where a draft or order is not in its form negotiable, but if it is accepted *payable to the order* of the payee, it thereby becomes negotiable. *Crosby v. Heartt*, 15 L. R. 304.

77. In negotiable instruments, the plea of error or mistake is not available against an endorsee. *Id.*

78. The law is well settled, that notice of the non-payment or dishonor of a bill, given to the drawer by the acceptor, or any of the parties to it, is sufficient, and enures to the benefit of all the other parties. *Union Bank v. Grimshaw*, 15 L. R. 321.

79. Letters written on the day the bill become due, by the acceptor, and addressed to the drawer, that they must go back protested, is sufficient notice to him. *Id.*

80. So, if a note or bill is presented in the forenoon of the day it becomes due, and payment is refused, notice given in the afternoon is good. *Id.*

81. Part payment, or a promise to pay a bill or note, furnish grounds to infer presentment, and notice of the dishonor or non-payment. *Id.*

82. So, where the defendant as drawer of bills, after being advised by letter, from the acceptor of their dishonor, acknowledged the debt and promised to pay the holder of the bills, by instalments on short time, it must be viewed either as an admission that the notices were good or a waiver of them. *Id.*

83. Possession of a negotiable note, endorsed in blank, will authorize the holder to recover on it, where his authority is not specially denied, or the contrary shown. *Cotton v. Union Bank*, 15 L. R. 369.

84. Where the notary states that "he demanded payment of the note *at the bank therein specified*," it is sufficient legal demand. *Carlile v. Holdship*, 15 L. R. 375.

85. The holder of a negotiable note, endorsed in blank, who possesses it in good faith, and gave for it a good consideration, cannot be affected by any failure of consideration, between the parties to it and the original endorser or holder. *Hagan v. Caldwell et al.*, 15 L. R. 380.

86. A draft drawn, payable at no particular time, may be considered at sight; and an acceptance payable four months after, is contrary to its tenor, and releases the drawer. *Burthe v. Donaldson et al.*, 15 L. R. 382.

87. Where an undertaker of work drew a draft on the owner, stating it was for plastering done on his building, the acceptance was an admission that the drawer was entitled to a privilege under the Code, which passed to the holder of the draft. *Id.*

88. Where a Bank receives a bill of exchange for collection, and fails to demand payment of the acceptor or maker, and not using the ordinary diligence to secure the liability of the parties to it, they make it their own, and become liable to the owner for the amount. *Armington's executor v. Gas Bank*, 15 L. R. 414.

89. The maker of a note cannot object to the insufficiency of the protest, because, whether the note is protested or not, does not encrease his liability. *Cain v. Morris*, 15 L. R. 494.

90. Protest is necessary to give interest, when none is stipulated; and is good to prove a demand, if specially denied. *Id.*

91. All the parties who are endorsers on a note or bill after the payee, must be governed in their liabilities by the *lex mercatoria*. *Gazquet v. Oakey*, 15 L. R. 537.

92. The law and responsibility is the same between endorsers, whether they received the note or bill successively from each other in the usual course of business, or are mere accommodation endorsers. *Id.*

93. So, where the second endorser takes up a note after protest, he has his recourse against the first endorser, for the amount he has paid. *Id.*

94. Notice of protest, left at the domicil or dwelling-house of the endorser, is sufficient. *Coulon v. Champlin et al.*, 15 L. R. 544.

95. The official character or signature of a notary, or other public officer, in another State, need not be proved in regard to protests of foreign bills. This is an exception to the general rule, that all signatures and official capacities of public officers in another State, must be proved as other facts. This exception is made in aid of commerce. *Waldron et al. v. Turpin*, 15 L. R. 552.

96. But in cases of promissory notes, in another State, the protests do not make proof of demand of payment, and are not admissible in evidence, unless the signature and official capacity of the officer, making them, is attested and proved. *Id.*

97. By the commercial law, a notary is not required to make a protest of a note or inland bill, as it is not considered an official act; and if a notary makes it, and is living, the protest is not received as evidence itself of a demand, even if his signature and capacity are undisputed. *Id.*

98. A notice to an endorser deposited in the principal post-office of the parish, but not addressed to him at his domicil or usual place of residence, five miles from which there is another post-office,

although in the same parish, is insufficient. *Foreman v. Wikoff*, 16 L. R. 20.

99. But where it is shown that notice reached the endorser the second day after protest, who lived twenty miles from the place, by private conveyance, it is sufficient proof of diligence and notice to bind the endorser. *Id.*

100. The mention on the face of notes, that they were given in part payment of a tract of land, does not prevent their negotiability. *Maurin v. Chambers & Williams*, 16 L. R. 207.

101. The plaintiff having struck out his special endorsement on the bill, at the close of the trial, is perhaps irregular, but cannot prejudice his rights against the endorser. *Huie v. Bailey*, 16 L. R. 213.

102. The holder of a bill or note, endorsed in blank by the payee, can recover, notwithstanding there were subsequent endorsements in full upon it; and he may strike them out or not, as he pleases. *Id.*

103. So, where a person endorses a bill or note to another, whether for value or for the purpose of collection, and comes again into the possession of it, he is to be regarded as the *bona fide* holder, and can recover; even if there be one or more subsequent endorsers in full, without producing any receipt or endorsement back to him, and whose names he may strike out or not, as he thinks proper. *Id.*

104. The holder of a bill, need not use active diligence to sue the acceptor or endorser; he may be passive and *forbear to sue*, if *he does not so agree* to give time to acceptor as to preclude himself from suing or suspend his remedy, to the prejudice of the drawer or endorser. *Id.*

105. A delay without sufficient consideration or new security, being a *nudum pactum*, will not discharge other parties, if the holder has not entered into such an agreement as will disable him from suing the acceptor. *Id.*

106. So, where the holders released the acceptors of a bill from the prison "limits, allowing them to leave the State on a written agreement that, it should in no way prejudice the holder's rights, which he has or may hereafter have for his debt," it does not discharge the endorser. *Id.*

107. A release of acceptors from the prison limits, does not discharge the endorser; provided nothing is done to discharge the judgment, so as to prevent the subrogation, of the endorser to the holder's rights. *Id.*

108. Where the endorser of a note executed a mortgage, and employed such terms in the act of mortgage, as show that he intended absolutely to secure the payment of the debt, he will be liable without any of the necessary steps to fix his responsibility as endorser. *Hoover, tutor, etc. v. Glasscock*, 16 L. R. 242.

109. If it appears from reading the protest that demand of

payment was made at the proper place on the cashier of the Bank, it is sufficient, although it may not be expressly stated that demand was made in the banking house. *Coleman et al. v. Flint*, 16 L. R. 250.

110. Obligors are bound on a note or obligation given to take up the note of other persons, as soon as they are over due and remain unpaid. *Delinico & Co. v. Terry*, 16 L. R. 269.

111. A note payable at plaintiff's domicile need not be formally presented for payment, especially when it is shown the defendant had no funds there. *Maurin & Co. v. Perot*, 16 L. R. 276.

112. Notice of protest sent to a post-office in a different State from that in which the endorser resides, is sufficient, when it is shown to be the nearest to his residence, and he receives his letters and papers there. *Harrison v. Bowen*, 16 L. R. 282.

113. It is not indispensably necessary that the demand of payment and notice be made and given by a notary. Any other person may make a demand and give notice; the mode of proof only is different. *Id.*

114. The possession of a draft by an accommodation acceptor, coupled with the fact that it had been put in circulation by the drawer, is sufficient to authorize the holder to recover, because payment by him will be presumed until the contrary is shown. *Wilkinson et al. v. Phelps*, 16 L. R. 304.

115. Where the bill and protest are produced in evidence without objection, it will be deemed sufficient proof of the drawer's signature, to authorize judgment against him. *Nott's executor v. Beard*, 16 L. R. 308.

116. Where a bill was accepted but not paid, it is no defence, in an action against the drawer, that it is *proved* he had *no funds* in the hands of the acceptor. *Id.*

117. Where the notary sends notice of protest to a particular post-office, *specifying it by name*, it will be sufficient, if it is the nearest to the residence of the party, without stating in what parish it is situated. *Id.*

118. Where the notary states he "demanded payment of the draft, at the counting house of the acceptor," it is sufficient, without saying "the draft was presented and payment thereof demanded." *Id.*

119. Where there is no absolute promise to pay by the endorser, with a full knowledge of the want of notice, which in law, creates a new obligation, he is not bound. *Lambetts et al. v. Petrovic*, 16 L. R. 315.

120. So, where the endorser admitted his liability after the note was due and protested; and that the time given to the maker of the note, should not affect his liability; but it appeared he was in reality not liable at the time for want of due notice of protest: *held*, that his acknowledgment did not bind him. *Id.*

121. The holder of a note endorsed in blank by the payee and

others, whose names precede that of the plaintiff himself, he may strike out all the subsequent and special endorsements, and recover against the maker. *Gordon v. Nelson*, 16 L. R. 321.

122. Where a note and protest are permitted to be read in evidence, without objection, it is too late to question the signatures thereto for want of proof. *Id.*

123. A demand of payment of the "proper book keeper," at the Bank where notes are made payable is sufficient. *Armor v. Lewis*, 16 L. R. 331.

124. There is no law or usage which authorizes the party on which a check is drawn, to delay payment until he receives a letter of advice from the drawer. *Merchants' Bank of New-York v. Exchange Bank of New-Orleans*, 16 L. R. 457.

125. Where a Bank pays a check, which has been altered and forged for a larger amount than the true sum, it will have recourse to the party to whom, or for whose benefit it was paid, for the amount of the forgery after its discovery. *Id.*

126. Where the notary states that he demanded "payment for said note, at the domicile of the maker thereof, and was answered that he was not there, and had left no funds to pay it," the demand is sufficient. *Deyraud v. Banks*, 16 L. R. 461.

127. The demand of the notary and protest of the notes for non-payment, is a sufficient putting in default to pay the price, to authorize a rescission of the sale of property. *Borgeat v. Smith's syndics*, 16 L. R. 467.

128. Where the clerk's certificate or note of the evidence offered, omits the protest and demand of payment made by the notary, the Court cannot presume that a demand of payment was made, although evidence of it exists in the record. *Legendre v. Woodrooff*, 16 L. R. 477.

129. A proposition made by an endorser before the note became due, to arrange and provide the means for the payment, which were not accepted by the holder, does not dispense with the protest, and due notice to the endorser. *McMahan v. Grant & Turnell*, 16 L. R. 479.

130. Pending negotiations with an endorser before maturity of the note which may or may not ripen into an agreement, cannot be considered as a waiver of protest and notice. *Id.*

131. A promise to accept, contemplates a specific bill or bills, whether drawn or to be drawn, and not a general authority to draw to a certain amount without any description of the bills. In the latter case it will not be such an implied acceptance or promise to accept as will bind the drawee. *Carrollton Bank v. Tayleur et al.*, 16 L. R. 490.

132. So a letter of credit within a reasonable time before or after the date of the bill, describing and promising to accept it, if shown to a person who takes the bill on the faith of the letter is a virtual acceptance. *Id.*

133. But where bills are drawn and sold to a third person, on a letter of the drawee, written to the drawer, allowing the latter a *limited credit*, available on certain conditions, the drawee is under no obligation, express or implied, to the holders to accept the bills. *Carrollton Bank v. Tayleur et al.*, 16 L. R. 490.

134. Letters of credit should be addressed to the persons who advance the funds or buy the bills *drawn under it*; and then they become the mandatories of the drawee or writer, and have nothing to do with the equities or relations between the drawer and drawee. *Id.*

135. Acceptors of bills of exchange drawn on their letter of credit, addressed to the purchasers of the bills are absolute acceptors, and not guarantors. *Bank of Illinois v. Sloo & Byrne et al.*, 16 L. R. 539.

136. There is no law requiring, and it is not necessary that a notarial protest should be signed by two witnesses. This instrument requires no other signature than that of the notary who protests. *Wagner et al. v. Hall*, 16 L. R. 563.

137. A second endorser wishing to hold the first responsible to him, should give him notice of protest; and for this purpose the law gives him until the next day, to notify his prior endorser. *McCulloch v. Commercial Bank*, 16 L. R. 566.

138. The holder of a negotiable note or bill of exchange has a right to have it protested against the maker, drawer, or any of the parties, even when it would not be necessary to do so to hold them liable; because it entitles him to claim interest. *Opdyke v. Corles*, 16 L. R. 569.

139. It is no ground of defence by the acceptor of a bill that the payee has written to him, stating it was lost and not to pay it to any one but himself. *Lambeth & Thompson v. Rivardi et al.*, 16 L. R. 572.

140. Where a note is deposited as collateral security, or pledged after it is due, it is subject in the hands of the depositor, to all equitable offsets, which the maker had against the original payee or holder, or which he may have until he receives notice of the transfer. *Lapice v. Clifton*, 17 L. R. 152.

141. As a general rule the endorsement and delivery of a promissory note transfers the property in it; but it is not every deposit and endorsement of a note as collateral security, that transfers such absolute property as will deprive the payee or depositor of all right, and the maker of every defence, he may have against it previous to the notice of the deposit or pledge. *Id.*

142. The endorsee of a draft, though only agent, may maintain an action in his own name, but it will be liable to the equities of the defendant against the real owner. *Id.*

143. So the transfer of a note before maturity under circumstances calculated to excite a reasonable suspicion in the endorsee of legal or equitable defences on the part of the maker, will not

preclude evidence of such equities or defences in an action by the endorsee. *Lapice v. Clifton*, 17 L. R. 152.

144. A note must be transferred in good faith, in the ordinary course of business, before maturity, and without any circumstances to induce a reasonable belief of the existence of such equities or defence, to preclude evidence of them by the maker. *Lapice v. Clifton*, 19 L. R. 152.

145. Demand of the maker of a note at his domicil, if he is absent, or at the place where it is made payable, when one is designated, is indispensable to fix or bind the endorser. The notary must in such cases find out the domicil. *Oakey et al. v. Bank of Louisiana et al.*, 17 L. R. 386.

146. A delay in giving notice to an endorser, occasioned by the irregularities of the post-office, through which it was transmitted, will not injure the plaintiff's right to recover. *Peyroux et al. v. Davis*, 17 L. R. 479.

147. A notary will not be permitted to alter his record of the protest and notice to endorsers, by interlining and inserting the manner or circumstances of giving notice which he or his clerk may have omitted. *Id.*

148. The endorser cannot object to proof showing the signature of the maker was erased through error, when he has not set up this in his defence; although this circumstance was not alleged in the petition. *Cantrelle et al. v. Percy*, 17 L. R. 520.

149. Proof of the defendant's signature as acceptor, and also of the payee of a bill, when the general issue is pleaded and the signature of the acceptors specially denied, is required before a recovery can be had. *Fryer et al. v. Darcy*, 17 L. R. 527.

150. A Bank employing a notary to protest a note deposited for collection, is not liable for the official misconduct, or failure of the notary to give notice to the endorser, by which the latter is discharged. *Hyde & Goodrich v. Planters Bank of Mississippi*, 17 L. R. 560.

151. Where the notary states he demanded payment of F. F. *the attorney in fact of the drawer*, the notary's statement is no evidence of the agency. It should have been proved on the trial like any other fact. *Fortier v. Field*, 17 L. R. 587.

152. The holders of a negotiable note receiving it without any notice of the conditions and equities between the original parties, and having paid a full consideration therefor, they will recover, notwithstanding it was given to the payees on certain conditions not then fulfilled. *Van Pelt & Fowler v. Eagle Insurance Co., et al.*, 18 L. R. 64.

153. The endorser of a note has no right to enquire whether the plaintiff, in whom the legal title appears, was the agent or real owner, unless by a fictitious assignment he is about to be deprived of his defence against the true owner. *Mitaine v. Ferguson*, 18 L. R. 92.

154. The endorsee or owner of a note who takes it after maturity, holds it subject to all the equities existing between the original parties. *Stetson v. Stackhouse*, 18 L. R. 119.

155. So, where S makes his accommodation note to D, to enable him to raise funds, with an understanding that the latter was to pay it, if he used it; and he passed it to the plaintiff *after it was due*, in his action to recover of the maker he was nonsuited. *Id.*

156. The promise to endorse a note made payable to the defendant, proved by parole evidence, is sufficient to authorize a recovery, although he refused to put his name to it. *Leeds v. Bozeman*, 18 L. R. 117.

157. Where the pleadings charge the plaintiff with fraud and collusion as the holder of a note; and the evidence shows its extinguishment by payment, he is bound to prove he gave a valuable consideration for it before maturity, without any knowledge of what had passed, or he cannot recover. *Moffatt v. Murray et al.*, 18 L. R. 357.

158. Where the defendants, sued as drawers of a draft, plead the want of due notice, but admit it was for accommodation, and one of them offered to give endorsed notes in payment: *held*, that the *onus probandi* of their having funds in the hands of the drawees devolved on them. *Nicolet's executor v. Gloyd et al.*, 18 L. R. 417.

159. Under the laws of Mississippi, the maker of a note has the right to oppose, against all subsequent endorsees, the same equities and defences which he may have against the original payee. *Hermann Briggs & Co. v. Hootsell et al.*, 18 L. R. 419.

160. Where the bill of sale of certain slaves, expresses it was for cash, and the purchaser gave a note for the balance of account due the vendor, including the price of the slaves: *Held*, that the note and bill of sale are of equal dignity, and no other evidence being produced, that the note was given through error, the legal presumption is, it is justly due, and that no cash was actually paid as stated in the bill of sale. *Id.*

161. Where the testimony is insufficient to show clearly that the note endorsed by defendant was altered after its execution, by adding the words payable *at the Union Bank*, he cannot exonerate himself from his endorsement. *Oakey & Co. v. Hennen*, 18 L. R. 435.

162. The defendants sued as endorsers, failed in proving their defence, and judgment against them was affirmed. *Coit & Co. v. Charbonnet et al.*, 18 L. R. 440.

163. Where a partner accepts a draft in the name of the firm, but which is for his individual benefit, on payment the other partner may be subrogated to the creditor's rights and recover the amount from his co-partner. *Hall v. Gaienné et al.*, 18 L. R. 442.

164. A power of attorney with a clause, "to make and endorse

promissory notes in her name, &c.," is clearly sufficient to authorize the endorsement of her name, and she is bound by the endorsement. *Dufour v. Beauregard et al.*, 18 L. R. 467.

165. Great forbearance on the part of the creditor towards the maker of a note, but who never appears to have given time, so as to preclude himself from suing and suspending his remedy to the prejudice of the endorser, the latter cannot complain or be exonerated. *Fortineau v. Boissière*, 18 L. R. 470.

166. Where the drawers of a bill depend for its being honored, on the proceeds of a claim against the drawee, then in litigation, and take receipt that it shall not be protested in case of dishonor, to save costs; they will not be considered as having funds in the hands of the drawee so as to entitle them to notice. *Benoist & Blanchard v. Their creditors*, 18 L. R. 522.

167. There is no particular form of notice of protest necessary, so that enough is stated to inform the parties to the bill of their liability and put them on their guard. *Barker v. Whitney*, 18 L. R. 575.

168. Notice may be sent in two ways; one by the holder to all the other parties to the bill, which will enure to the benefit of any endorser who pays it, in an action against his predecessors or the drawer; or the holder may notify his immediate endorser, and the next &c.; and one day is allowed to each party to deposit notice in the post-office &c. *Id.*

169. A party whose name is not on a bill though interested in it, is not entitled to the benefit of the rule allowing each party a day to send notice to the party before him. *Id.*

170. If the holder of a bill or note place it in the hands of his banker or agent with his name on it, the agent is only bound to give notice of the dishonor to his customer, and he to the party next entitled to notice. *Id.*

171. But where a bill is protested, and notice for the endorser sent to the third person, whose name is not on the bill, and he on the following day deposits it in the post-office, to be sent to the endorser, the latter will be discharged. *Id.*

172. The endorser has a right to recover the damages which he has paid on a protested bill of exchange, from the acceptors, through whose fault his liability as endorser, had attached. *Shields et al. v. Paul*, 19 L. R. 72.

173. The gratuitous refunding by the holders, to an endorser, damages on a protested bill paid by him, confers no right on the acceptors to recover them from him, although they had also paid or refunded to him, on judgment rendered. *Id.*

174. Presentation and demand of the "book keeper" of the maker of a note, at their counting room, is sufficient demand, without giving the name of the clerk or book-keeper. *Austin et al v. Latham*, 19 L. R. 88.

175. So notice of protest left "on board the brig A, with the mate,

which vessel he commands," is sufficient to bind the endorser, without naming the mate. *Austin et al. v. Latham*, 19 L. R. 88.

176. The endorser cannot complain that he received earlier notice by sending it on board his ship, than if sent by mail as required by law. *Id.*

177. The endorsement of defendant need not be proved, when he does not specially deny it. *Id.*

178. Where a promissory note is given for a balance of account, in an action between the original parties, the debtor may go into the consideration and contest the accounts, but the burden of proof is on him to show affirmatively errors or omissions. *Flower v. Millaudon*, 19 L. R. 185.

179. Where the owner of property places it in the hands of a third person, who makes advances on it by drawing a bill, the drawee and consignee, cannot appropriate it to the payment of his debt against the owner, until the advance is paid. *Zacharie & Co. v. Rogers & Harrison*, 19 L. R. 218.

180. Drawees who are under no obligation to accept a draft, bind themselves to pay it, when they receive the goods, or property on which it is drawn. *Id.*

181. The acceptance of a draft merely by the receipt of the bill of lading, and the property on which it is drawn, completes the obligation of the drawee to pay it. *Id.*

182. Where the admissions and declarations of the payee and endorsers of a note, that he *transferred* it to the plaintiff, are *proved* by witnesses, it is sufficient to authorize a recovery, without actual proof of his signature. *McKown v. Mathes*, 19 L. R. 542.

183. Where it is shown that the plaintiff sues as agent, or for the benefit of the payee of a note, the maker may set up every equitable defence he may have against the payee. *Id.*

184. Where notes given for the price of property producing fruits and revenues, are by agreement or otherwise to remain deposited and payment suspended, until certain defects in the title are cured, on their restoration, payment of the interest arising *ex morâ* will be decreed, as a compensation for the fruits of the thing sold, when it remains in the enjoyment of the vendee. *Ball et al. v. Le Breton et al.*, 19 L. R. 147.

185. The purchaser who wishes to relieve himself from the payment of interest, must avail himself of the faculty given him to deposit the price due by him. *Id.*

186. Where the purchaser is actually disturbed in the possession and enjoyment of the thing sold, he can require security before payment of the price can be demanded. *Id.*

187. Usurious interest which has been paid cannot be recovered back. *Kenner & Co's. syndic v. Holliday et al.*, 19 L. R. 154.

188. The mere taking a new security or bill which does not mature until after the one sued on becomes due, is not such an agreement to give time as will release the endorser or which sus-

pend the remedy or rights of the holder. *Buckner, Stanton & Co. v. Watt*, 19 L. R. 211.

189. It is not sufficient to show that in point of fact no damage was sustained by the neglect of the holder of a bill of exchange, to give notice of its dishonor in order to hold the drawer liable after its acceptance. *Williams v. Brashear*, 19 L. R. 370.

190. Where the drawer has no funds in the hands of the drawees, and has no right to expect his bill will be paid, there being no commercial transactions between the parties, notice of non-payment and protest is unnecessary. *Id.*

161. But where there are running accounts between the drawer and drawees to induce the former to believe his bill will be honored, he is entitled to notice of non-payment, although in fact he had no funds in the hands of the drawees. *Id.*

192. Two witnesses are required, not only to the protest, but to the record of the certificate of the notary, under the act of 1821; and this is not superseded by that of 1827; both of which require the *certificate* of protest to be attested by two witnesses, to be *evidence* of notice. *Gas Light and Banking Co. v. Nuttall* 19 L. R. 447.

193. The certificate of the notary must be recorded and attested by two witnesses, to be admissible as evidence of notice. *Gas Bank v. Phelps*, 19 L. R. 452.

194. Where the last day of grace for the payment of a note or bill, is a Sunday or a day of rest, the protest is properly made on the preceding day. *Huie v. Brazeale*, 19 L. R. 457.

195. Personal notice of protest may be made on the endorser at any place however distant from his domicile; and personal notice dispenses with constructive notice, by sending it through the post-office. *Id.*

196. Where the certificate expresses the name of the post-office to which notice to the endorser is sent, it is sufficient, without stating it is the nearest to his residence. A denial might, perhaps put the adverse party on his proof that it was the nearest. *Gas Bank v. Desha*, 19 L. R. 459.

197. The want of amicable demand cannot be pleaded, when the protest states that demand was made of the makers of the note and the endorser notified, that he would be looked to for payment. *Id.*

198. Bankable interest is due on notes discounted in Bank, from the day of protest. *Id.*

199. The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand, protest and notice. *Peets v. Wilson*, 19 L. R. 478.

200. Where the plaintiff took the defendant's note, endorsed in blank by the payee and before due, but with a knowledge of the equities existing between the original parties, amounting to a failure of considerations, he failed to recover. *Jones v. Young*, 19 L. R. 553.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Every note issued by a Bank, promising to pay a given sum on demand, is a distinct and separate promise. *Bartlett v. New-Orleans Canal and Banking Co.*, 1 R. R. 543.

2. As a general principle, an administrator cannot create any liability binding on the estate, though he may on receiving payment discharge a debt due to it; and if he discount a note received in payment on the sale of property belonging to the estate, his endorsee will have a claim against him personally, and cannot be compelled to wait for payment in the ordinary course of administration. *Hestres v. Petrovic and another*, 1 R. R. 119.

3. A wife not separated in property from her husband, cannot bind herself jointly with him either as drawer or endorser of a note, for a debt contracted on account of the community during the marriage. *Martin, executor v. Drake and husband*, 1 R. R. 218.

4. A note drawn by a wife not separated in property, to the order of her husband, and endorsed by him, is void; the latter cannot enforce its payment nor transfer by endorsement any right to a third person to enforce it. *Id.*

5. A note drawn by a wife, payable to her husband, is absolutely null and void in the hands of the latter; no law recognizes any obligation of the wife to the husband, resulting from any contract between them. But where such note has been endorsed by the latter to a third person, it will bind the endorser. *Petitpain v. Palmer and husband*, 1 R. R. 220.

6. Failure of consideration, will be no defence by the maker, to an action by the purchaser of a note, sold at a sheriff's sale, unless it be proved that the purchase was made with knowledge of such defence. *Faulk v. Clack*, 1 R. R. 8.

7. Where a promissory note did not come into the hands of the plaintiff, in the ordinary course of business, the maker may prove want or failure of consideration. *Littell, tutrix, v. Marshall and others*, 1 R. R. 51.

8. Improvements made on the public lands may be sold, and are a good consideration for a note, though such sale gives no title to, nor any lien or privilege upon the land independently of the rights conferred by the laws of the United States. *Ratcliff v. Bridger*, 1 R. R. 57.

9. One who has received an injury, for which he is entitled to damages in a civil action, and which may give rise to a criminal prosecution, may lawfully receive a sum, the amount of the damages to which he is entitled, even when offered in the hope that, being satisfied therewith, he will not resort to a criminal prosecution; and a promise to pay such damages is a good consideration for a note. *Butterly v. Blanchard*, 1 R. R. 340.

10. Possession of a negotiable instrument endorsed in blank, is

prima facie evidence of ownership, and yields only to proof to the contrary. *Dussin v. Charles and another*, 1 R. R. 195.

11. The plaintiffs, as agents of the owner of certain notes, deposited them with defendants for collection; the notes were not paid at maturity, nor were they regularly protested, but were subsequently returned to the owner. Plaintiffs considering themselves responsible, to the latter, sued defendants in their own names, alleging that the notes were deposited by them as agents of the owner. *Held*, that the plaintiffs not having paid the amount of the notes, and their agency having terminated, payment to them would not exonerate the defendants from the claim of the owner. *Hermann and another v. The Union Bank of Louisiana*, 1 R. R. 222.

12. Instructions to an agent to invest the proceeds of a bill in a particular way, is an express and special authority to endorse the bill in the name of the principal, such as is required by art. 2966 of the Civil Code; for the investment could not be made without such endorsement, whether money were to be procured by the sale of the bill, or the bill itself were to be given in payment for the articles in which the investment was to be made. *Swift and others v. Hare and another*, 1 R. R. 303.

13. Notice of protest may be given on a Sunday, or day of public rest or holyday; but the endorser is not bound to open the letter containing the notice or to act on it, until the next day. *Deblieux and another v. Bullard and another*, 1 R. R. 66.

14. Under the act of 14th February, 1821, the certificate of a notary will not be sufficient proof of notice of protest, unless attested by two witnesses. *Id.*

15. Demand of payment and presentment of the note at the place of payment, indicated in the instrument itself, are indispensable to a recovery against the maker, and a *fortiori* against the endorser. *Hart and others v. Long and another*, 1 R. R. 83.

16. Notice of protest to the endorser of a promissory note, when sent by mail, must be directed to the post-office nearest to his residence, where it is not shown that he was in the habit of receiving his letters from another office, or he will be discharged. *Union Bank of Louisiana v. Brown and another*, 1 R. R. 107.

17. Where a note is drawn by two persons, who are bound *in solido*, the endorser will be liable after notice, on proof of demand of either, and refusal of payment. *Hestres v. Petrovic and another*, 1 R. R. 119.

18. Notice of protest to an endorser, who had left the country, with the intention of remaining abroad, served on his agent, will bind the former. *Id.*

19. Where a note is made payable at a future period, with interest from date if not punctually paid, such interest is in the nature of a penalty for not punctually performing the principal obligation, and the failure to do so must be strictly proved to entitle the plaintiff to recover the additional interest. Where such

a note was payable at a particular place, proof that it was presented and demand of payment made at such place, after it fell due, will not entitle the holder to recover the additional interest. *Glover and others v. Doty*, 1 R. R. 130.

20. The maker of a note cannot complain of the want of protest, or that it was illegally protested. *McDonough v. Fost*, 1 R. R. 295.

21. Where a note is payable at a particular place, payment must be demanded there before a recovery can be had. *Stillwell v. Bobb*, 1 R. R. 311.

22. Notice of protest to an endorser, living four and a half miles from the town where the note was payable, addressed to him through the post-office of that town, which was the nearest to his residence, is insufficient by the laws of Mississippi; *aliter*, under the laws of this State. *Glenn v. Thistle*, 1 R. R. 572.

23. Where in an action against the endorser of a note, the plaintiff has been non-suited in consequence of want of legal demand at the place of payment, and pending a motion for a new trial, the latter, with full knowledge of the circumstances of the demand and of the non-suit, undertakes voluntarily and absolutely to pay, he will be bound. *Hart and others v. Long and another*, 1 R. R. 83.

24. Where the endorsers of a note, who were partners at the time of endorsement, have been discharged by want of legal demand, a subsequent promise to pay, made by one of them after the dissolution of the firm, will not be binding on the other. *Id.*

25. To render obligatory a promise by an endorser to pay a note from which he has been exonerated in consequence of want of notice of non-payment by the maker, it must be shown that the promise was made by the former, with a full knowledge that he had been legally discharged. *Glenn v. Thistle*. 1 R. R. 572.

26. The drawer of a note negotiated after maturity, may set up any equitable defence against the holder, which he could have urged against the payee. *Ford v. Dosson*, 1 R. R. 39.

27. In a suit by the holder against the drawer of a promissory note, negotiated after maturity, which had been given on the settlement of a partnership formerly existing between the drawer, the payee, and a third person, the defendant may be relieved by showing error in the settlement, without making his partners parties to the suit. *Id.*

28. It will be no defence to an action by the payee of a note, that it was taken by him for a debt due to an estate of which he had been administrator, and had, on a settlement of his accounts in the Court of Probates, and a subsequent partition among the heirs, been assigned to one of them, where there is no evidence that the plaintiff seeks to avail himself of the suit to the injury of the latter. The transfer being a matter of record, the defendant will be discharged by payment to the heir. *Duval v. Kellam*, 1 R. R. 58.

29. The holder of a note may sue the last endorser, though the

maker and previous endorser be solvent. *Lambeth and another v. Caldwell and others*, 1 R. R. 61.

30. In an action by the endorsee against the maker and endorser of a note given for the price of a slave, evidence that the slave has instituted a suit for her freedom, will not entitle the defendant to a continuance until such suit can be decided; but at most, to a suspension of the payment of the price, until security is given, according to art. 2535 of the Civil Code. *Dussin v. Charles and another*, 1 R. R. 195.

31. An accommodation endorser of a note is a mere surety for the maker; and a privity exists between such surety and the creditor, which compels the latter to preserve unimpaired all his rights against the debtor, where he intends to look to the surety for payment. This obligation is a corollary of the right of subrogation, established by law in favor of the surety who pays the debt of his principal; and if the creditor fail to comply with this obligation, or destroy or impair the right of subrogation to his mortgages or privileges, the surety will be released. *Hereford v. Chase*, 1 R. R. 212.

32. The vendor of slaves, sold in a lump, received from the purchaser a note for the price, endorsed by a third person as surety of its payment, and subsequently purchased from his vendee a part of the slaves. *Held*, that the vendor's privilege and the surety's right of subrogation to it, were indivisible; that the latter existed entire as to all the slaves, for the full amount of the debt, and that it could not be divided and restricted to certain slaves, for certain amounts, at the will of the original vendor; and that by such repurchase the endorser was discharged. Had the vendor repurchased all the slaves, his privilege would have been extinguished by confusion; and the subrogation to which the surety would be entitled on paying the price, would have become impossible. *Id.*

33. In a suit against the endorser of a note, where the name of the latter has been erased, the plaintiff must account for the circumstance, or the obligation will be considered as cancelled. The affidavit of the plaintiff will not be received to prove that such erasure was made through error or accident; it must be established by legal evidence, not by the declarations of the party who seeks to recover. *Slocomb and others v. Watkins*, 1 R. R. 214.

34. Where one of two obligors, on a joint note who must be sued together, has died, the action must be brought before a Court of ordinary jurisdiction. *Gallier v. Walsh and another*, 1 R. R. 226.

35. In an action on a note, not protested at maturity, where the defendants have not been put in default before suit, and there is no evidence of any promise to pay interest, it will only be allowed from judicial demand. *Pawling v. Houren and others*, 1 R. R. 229.

36. Plaintiff was holder of defendant's note for the purchase of a lot, subsequently sold by the latter to a third person, who bound himself to pay the note. Plaintiff did not intervene in the act of

sale from the defendant, and expressly declare by signing it that he accepted the vendee as his debtor; but he always looked to him as such, received payment from him, sued in his own name on the agreement in the contract between him and the defendant, and after obtaining judgment, granted him delay on conditions more onerous to defendant, than any he had agreed to: *held*, that the defendant was discharged. *Walton v. Beauregard*, 1 R. R. 301.

37. Where in an action against the drawer and accommodation endorsers of a bill, there was judgment for plaintiff against the drawer for a part of the amount claimed, but against the plaintiff as to the endorsers, and he appealed from so much of the judgment as was in favor of the latter, without making the drawer a party, the amount of the judgment cannot be changed as to her, nor increased as to the endorsers, who must be viewed as her sureties, and cannot be made liable for a larger sum than the principal debtor. *Tenney v. Russell and another*, 1 R. R. 449.

38. Costs of protest of a Bank-note may be recovered, though a notarial demand was unnecessary to entitle plaintiff to interest. The object of the protest is not only to secure interest, but to procure permanent and authentic evidence of a demand at the place of payment, and where different notes of the same institutions, held by the same individual, are separately protested, he will be entitled to recover the costs of protesting each note. Having to make a separate demand on each, the notary might well refuse to include them all in a single protest. *Trezevant and others v. Bank of Tennessee*, 1 R. R. 465.

39. The neglect or refusal by a Bank to pay its notes in specie, is only a passive violation of its contracts; and the mere announcement of its intention not to pay notes in specie, by a resolution suspending specie payments, cannot, consequently, be considered an active violation of its contracts. *Bartlett v. New Orleans Canal and Banking Co.*, 1 R. R. 543.

40. To construe a promise to accept a bill to be afterwards drawn, into an actual acceptance, so as to authorize a suit by the holder of the bill, as if accepted the bill must be described in terms not to be mistaken. The description must be sufficient to identify the bill when sued on, and such as can apply to no other bill; it must result from the promise itself and cannot be aided by any statement on the face of the bill. *Von Phul v. Sloan*, 2 R. R. 148.

41. The evidence necessary to support an action on a bill as an accepted bill, and on a breach of promise to accept, is materially different; to maintain the former, the promise must be applied to the particular bill alleged to have been accepted; in the latter case, the evidence may be of a more general character, and the authority to draw be collected from circumstances, and extended to all bills coming within the scope of the promise. *Id.*

42. The acceptance of a bill of exchange or promissory note,

though after sight of an endorsement, does not admit the signature of the endorser. The acceptor looks only to the signature of the drawer, and that alone he is precluded from afterwards disputing. *Robbins v. Lambeth*, 2 R. R. 304.

43. Plaintiffs, endorsers of a bill of exchange, alleged to have been burnt, drew on the acceptors for the amount, payable at the maturity of the original bill. On presentation of the draft, the latter told plaintiff's agent "that there would be no difficulty about it," which led the agent to conclude that the draft would be paid, *held*, that these words, "which probably referred only to the embarrassment resulting from the loss of the bill," did not, under the circumstances, amount to an absolute acceptance of the draft, nor waive the acceptor's right to be satisfied of the genuineness of the endorsement of the original bill. *Id.*

44. An inconsiderate or hasty promise to accept a bill may, perhaps, be revoked, where no third person has, in the meantime, been affected by it. *Id.*

45. A promise, to accept a bill, if the amount exceed five hundred dollars, must be proved by at least one witness, and by other corroborating circumstances. These circumstances must be established *aliunde*, and not by the witness himself. *Id.*

46. The half of a banknote, cut in two is not negotiable. The negotiability of the note can only be restored by re-uniting the parts. *Murdock v. Union Bank of Louisiana*, 2 R. R. 112.

47. Where a bill of exchange is assignable only by endorsement, one who obtains possession of it by a forged endorsement, acquires no interest, though ignorant of the forgery; and the original holder may recover of the acceptor, though the latter have paid the amount of the bill to the person in possession under such endorsement, unless it be shown that such payment was made through the fault of the original holder; but the fault must be shown, and the burden of proof is upon the party who justifies the payment. *Jackson v. Commercial Bank of New Orleans*, 2 R. R. 128.

48. Action by the endorsee of a draft, drawn by the trustees of a college, on the treasurer of the State, for a portion of the annual appropriation for the use of the college, payable to J. N., or order, and endorsed J. N., treasurer. Plaintiff having paid part of the draft to J. N. in cash, and the balance by acceptances of drafts drawn on him by a firm of which J. N. was a partner, and J. N. having shortly after become insolvent, on an answer by the trustees, cited in warranty, alleging that plaintiff had received the original draft, knowing that it had been entrusted to the treasurer of the college for collection for the use of the college, and not to be negotiated: *held*, that the draft was, on its face, an official paper, and that the plaintiff having connived with J. N. to divert its amount from the use of the college, could not recover in an

action against the treasurer of the State as acceptor, or the college, as drawers of the draft. *Hardy v. Gardère*, 2 R. R. 154.

49. Where notes given for the price of property, sold by one in insolvent circumstances for the purpose of giving an undue preference to certain creditors, have, in the ordinary course of trade, come into the possession of third parties, without notice of the nullity of the sale, the latter will be protected. *Robinson v. Shelton*, 2 R. R. 277.

50. It is essential to the validity of a pledge, as to third persons, that notes or other obligations payable to bearer or order which form the subject of the pledge, should be endorsed by the payee or pledger. C. C. 3128. *Id.*

51. The possession of a promissory note, payable to order and endorsed in blank, is *prima facie* evidence of title, the property passing by delivery. No other transfer is necessary to entitle a party to avail himself, *via ordinaria*, of a mortgage given to secure its payment; but to procure *via executiva*, the mortgage must be transferred by an authentic act. *Fitzwilliams v. Wilcox*, 2 R. R. 303.

52. One acting as the agent and on behalf of a partnership of which he is a member, cannot transfer a note to himself as the agent of a third party. The transfer of a note is a contract, requiring the concurrence of two minds. *Florance v. Adams*, 2 R. R. 556.

53. Notice of protest, left with a black servant in the office of the person notified, is sufficient. *Bank of the United States v. Merle*, 2 R. R. 117.

54. Notice of protest need not be sent by the mail which leaves on the day of the protest; but it must be deposited in the post-office in time to go by the first mail of the succeeding day. *Id.*

55. A note dated the thirty first of September, will be considered as having been made on the thirtieth day of that month: and where such a note was payable at six months, it will be due on the thirtieth of March, and must be protested on the second of April following. *Wagner v. Kenner*, 2 R. R. 120.

56. The computation of the time of maturity of a bill or note payable one or more months from date, must be made according to the Gregorian calendar i. e. from the day of the month on which it bears date to the corresponding day of the month of its maturity, without reference to the number of days in the months; and such has been the custom in this city, thus, a note drawn on the 28th, 29th, 30th or 31st of January, payable one month from date, will be due on the 28th of February, if the year be not bissextile, because the month of February has no other corresponding day; but a like note dated the 28th or 29th of February, will be due on the 28th or 29th of March. Such a note drawn on the 31st March, will be due on the 30th of April; but if dated on the 30th of April, it will be due on the 30th, not 31st of May. *Id.*

57. Art. 2055 of the Civil Code, which provides that, "when the

term referred to in a contract consists of four or more months, the parties, if they have not made any other explanation, shall be deemed to have meant months in the order in which they stand in the calendar, after the date of the obligation, and with the number of days such months respectively have," does not apply to bills of exchange or promissory notes. *Wagner v. Kenner*, 2 R. R. 120.

58. A Bank employing its regularly appointed notary to protest a note deposited with it for collection, will not be liable for his official misconduct or failure to give notice to the endorsers. *Frazier v. New-Orleans Gas Light and Banking Co.*, 2 R. R. 294.

59. A Bank will be responsible for the amount of a note issued by it, on proof of its loss and of the contents of the note. So, on the production of the half of a note, where the absence of the other half is fairly accounted for, the Bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half. *Murdock v. Union Bank of Louisiana*, 2 R. R. 112.

60. In an action by the holder of the half of a Bank-note, where the half on which the president's signature is usually affixed has been lost, the signature of the president need not be proved. It will not be presumed that notes were ever issued without the signature of that officer. *Id.*

61. Interest will be allowed on the amount of the damages on protested bills or notes. *Bank of the United States v. Merle*, 2 R. R. 117.

62. The holder of a negotiable instrument is not required to prove the consideration which he gave for it, unless specially called upon by the answer so to do. *Davidson v. Keyes*, 2 R. R. 254.

63. The plea of the general issue in an action against the acceptors of a bill of exchange, admits their signature which is all that the plaintiff is bound to prove. *Carmena v. Peyroux*, 2 R. R. 303.

64. The demand to be made on a note payable at a particular place, cannot be assimilated to the amicable demand required by the Code of Practice. The want of the latter must be pleaded to put the plaintiff on the proof of it, and a failure to establish it does not prevent his obtaining judgment, but only subjects him to the payment of the costs incurred before the appearance of the defendant, the former must be alleged and proved or the plaintiff cannot recover. *Stillwell v. Bobb*, 2 R. R. 327.

65. Cases of *Wetmore & Co. v. Merrifield* L. R. 513 and *Booraem v. Merrifield*, L. R. 594 overruled, so far as they go to establish that in an action against the drawer of a bill or maker of a note, payable at a particular place, proof of a demand at such place is not necessary where want of amicable demand has not been pleaded. *Id.*

66. The holder of a note given for the price of a slave, will be entitled to interest from maturity, though the note contained no stipulation to that effect, and was not protested. C. C. 2531, 2532, *Gay v. Kendig*, 2 R. R. 472.

67. Action against defendant as drawer of certain notes and endorser of others. Plea of prescription, and proof of promise by defendant, within the time necessary to prescribe, to give his notes for the debt, payable at a short time ; but no evidence of notice of the protest of the notes on which he was endorser, nor that he was aware of his discharge at the time of the promise. *Held*, that the defendant was bound for the notes of which he was drawer, but discharged as to those on which he was endorser. To render promises to pay binding on an endorser, who has been discharged, it must be proved that he was aware of his discharge at the time of the promise. *Tomes v. Montanye*, 2 R. R. 158.

68. A balance due on an unsettled account cannot be pleaded in compensation to an action on a promissory note ; nor in reconvention, when unconnected with the plaintiff's claim. It must be sued for in a direct action. *Jonau v. Ferrand*, 2 R. R. 216.

69. The acceptor of a bill has no right to inquire into the consideration between the drawer and payee, or between the latter and a subsequent endorsee. If he pay the bill, he cannot be affected by any want or failure of consideration which the drawer or payee may set up. *Davidson v. Keyes*, 2 R. R. 254.

70. It is no defence to an action on a bill drawn under an unconditional authority, to allege that the authority should have been used in a particular way. Though the holder of the letter of credit abuse the confidence reposed in him, by applying it to purposes not contemplated or improper, the party who gave the letter cannot complain of the acts of one whom he trusted with an unconditional authority. *Id.*

71. An accommodation endorser, must be viewed in the light of a surety, and as such is entitled to discuss the property of his principal. *Dwight v. Linton*, 3 R. R. 57.

72. The payee of a note made by the defendant desiring to secure a debt due to plaintiffs, endorsed the note in blank, and deposited it in the hands of plaintiff's attorney, to apply a portion of the the proceeds, when due, to the payment of the debt ; the balance to be accounted for to the endorser. Defendant was notified of the transfer to plaintiffs' attorney for the purposes mentioned, and promised to pay the note of the attorney. In an action against the maker : *Held*, that the endorsement and delivery of the note, for the purposes stated, and the notice to defendant, operated a legal transfer of the portion intended to be paid to the plaintiffs ; that defendant's promise established his consent to the division of the debt ; that claims against the payee, subsequently acquired by defendant, can only be set off against the portion of the note not transferred for plaintiffs' benefit ; and that the attorney became the agent of both the plaintiffs and payee, and was accountable to each for the portions respectively due to them. *Lambeth v. Kerr*, 3 R. R. 144.

73. One who purchases a note, knowing that the payment will

be contested, will hold it subject to any defence to which it would have been subject in the hands of the payee. *Bordelon v. Kilpatrick*, 3 R. R. 159.

74. The transfer of a negotiable note, by endorsement, operates a transfer of any mortgage given to secure its payment. C. C. 2615. *Auguste v. Renard*, 3 R. R. 389.

75. A note dated the 29th August, payable at six months, will be due on the 3d of March following. *Wood v. Mullen*, 3 R. R. 395.

76. Proof of demand of payment, at the place at which the note is payable, on or after its maturity, is essential to a recovery in an action on the note. *Wood v. Mullen*, 3 R. R. 395.

77. Discharging, or giving time to any of the parties to a note or bill, is a discharge of every other party who, upon paying it, would be entitled to sue the party to whom such discharge or indulgence has been granted. *Calliham v. Tanner*, 3 R. R. 299.

78. The holder of a protested note, having presented it for payment to the administrator of the succession of the payee and first endorser, it was allowed by the latter, and placed on the tableau of distribution filed by him. Subsequently to the homologation of the tableau, the holder obtained a judgment, by confession, against the second endorser, and, in consideration of a higher rate of interest, granted him time, at the expiration of which the latter paid the amount due on the note. In an action by the second endorser, against the administrator of the first, to recover the amount thus paid: *held*, that the first endorser, who would have been entitled, on payment of the note to the holder, to require its delivery, that he might exercise his rights against the maker, was discharged by the indulgence; and that the insolvency of the maker, at the time of the indulgence cannot affect the question of his discharge. *Id.*

79. Notice of protest must be directed to the post-office nearest the residence of the person to whom it is sent. Even where a party has been in the habit of receiving his letters at different offices, and is proved to have had a box in the most distant of the two, notice of protest directed to the latter will be bad. *Mechanics's and Traders' Bank of New Orleans v. Compton*, 3 R. R. 4, *Nicholson v. Maders*. 3 R. R. 242.

80 The act of the thirteenth of March, 1827, relative to the protest and notices to drawers and endorsers of bills and notes, does not change the general commercial law, as to the diligence to be used in serving notices of protest, it merely provides a new mode of proof of such diligence, by authorising the notary, or other officer, to state in his protest the manner in which the demand was made of the drawer, acceptor, or person by whom such order or bill was drawn or given, and in a certificate subjoined thereto, the manner in which the notices were served or forwarded, and by making a certified copy of such protest and certificate evidence of all the matters therein stated. The provisions of this act being in derogation of the general commercial law, the mode of proof

which it authorizes will be received as sufficient evidence of notice, only where the formalities it prescribes have been strictly complied with. *Duncan v. Sparrow*, 3 R. R. 164.

81. Where the party to whom notice is to be given, does not reside in the town where the protest was made, the second section of the act of 1827, requires, first, that the notice be put into the post-office nearest to the place where the protest was made, and secondly, that it be addressed to the party to be notified, at his domicile or usual place of residence; and the omission of either will be fatal. *Id.*

82. A notice of protest addressed to a party, at the post-office from which he receives his letters and the one nearest to his residence, or addressed to him, without indicating any particular place, and deposited in such post-office, will not be sufficient compliance with section two of act of 1827. The notice must in addition, be addressed to him at his domicile or usual place of residence. *Id.*

83. Notice of protest to an endorser, put into the post-office at the place where the note was payable and at which he was in the habit of receiving his letters, addressed to him there, is sufficient by the law of Mississippi. Otherwise, in this State, since the act of thirteenth of March 1827. *Duncan v. Sparrow, application for re-hearing*, 3 R. R. 167.

84. Proof that notice of protest was deposited in the post-office at seven o'clock A. M. the day of the protest, shows due diligence, and it will be presumed in the absence of evidence to the contrary, that the notice was in time to go by the mail of that day. *Commercial Bank of Natchez v. King*, 3 R. R. 243.

85. The certificate of a notary that he left the notice of protest at the domicile of the endorser is sufficient. It is not necessary that it should show whether he delivered the notice to one in the house, or simply left it there, as a notice either way is good. *Manadue v. Kitchen*, 3 R. R. 261.

86. Notice to one who resides in a place where the protest was made, must be served personally, or by leaving it at his residence or place of business. *Id.*

87. Where a party resides at two places, alternately, being generally at one during one portion of the year, and at the other during the rest, but goes frequently from one to the other, notice of protest, directed to either, will be sufficient. *Exchange and Banking Co. of New Orleans v. Boyce*, 3 R. R. 307.

88. Art. 2256 of the Civil Code, which provides that parole evidence shall not be received against or beyond what is contained in written acts, is inapplicable to a case where the defendant offers witnesses to prove that the endorsement of a note was merely as security, and that it was to be paid out of collections to be made by him from claims due to the drawer. The evidence neither explains, nor contradicts the written instrument, but goes to establish

a collatorial fact or agreement in relation to it. *Dwight v. Linton*, 3 R. R. 57.

89. In an action in this State against the endorser of a note, dated at a place in this State in the parish in which the endorser resides, payable in an other State, the presumption will be, until the contrary is shown, that the note was endorsed at the place of its execution; and the obligation will be governed by the *lex loci contractus*. *Duncan v. Sparrow, application for re-hearing*, 3 R. R. 167.

90. Where it clearly appears that defendant intended to authorize a third person to endorse certain notes in his name, he will be bound by such endorsement, though the letter of attorney were received by his agent after the endorsement. The authority, subsequently received, would amount at least, to a ratification of the act of the agent. *Exchange and Banking Company of New-Orleans v. Boyce*, 3 R. R. 307.

91. The holders of notes given for the price of a tract of land, though not identified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified, their identity may be proved by his oath. *Succession of Johnson*, 3 R. R. 216.

92. A credit which appears to have been endorsed on a note while in the possession of the payees, will be binding on them, unless they show it to have been made through error. *Norcross v. Theurer*, 3 R. R. 375.

93. The holder of an accepted draft for a sum payable in the notes of a particular Bank, protested at maturity, will be entitled to recover the value of the notes at the date of the protest. A subsequent tender of the amount in the notes of the Bank, they having depreciated in the mean time, will not entitle the defendant to settle the debt at the value of the notes at the date of the tender. *Meeks v. Davis*, 3 R. R. 326.

94. A note though made payable in dimes; may be discharged by a payment in any other legal coin of the United States. *Commissioners of the Atchafalaya Rail Road and Banking Company v. Bean*, 3 R. R. 414.

BONDS.

1. Judicial bonds, taken by the Sheriff from persons in custody, must be executed in the manner authorised by law; any clauses that are supperadded will be rejected, and those omitted supplied. *Slocomb et al. v. Robert*, 16 L. R. 173.

2. The effect of bonds, and the rights of parties to them, which are required by law to be given in judicial proceedings, are to be

tested by the law directing them to be taken. *Welch & Co. v. Thorn et al.*, 16 L. R. 188.

3. In legal proceedings the penalty of the bond is fixed by the law or the Court, and the law points out the objects for which it is given. *Id.*

4. In this State, there being no distinction in the proceedings between the law and equity jurisdiction of our Courts, the penalty of a judicial bond is disregarded, and judgment given for the damages which the party has really sustained. *Id.*

5. So where a penal bond was given by a defendant, on removing a suit from the State Court to the United States District Court, that he was to appear and put in *special bail*, and he failed to put in bail, upon which the plaintiff dismissed his suit, and brought his action on the bond: *held*, that he cannot recover, because he had not proceeded to judgment in his suit, and did not show that he had sustained any damages. *Id.*

6. Where a bond is taken payable to A. B., Sheriff, &c., he cannot sue in his individual capacity to recover the amount from the obligors, when there is no evidence that he acquired any right to it but the bond itself. *Buisson v. Hyde et al.*, 17 L. R. 19.

7. It is not certain that an ex-Sheriff could recover on a bond taken payable to himself as Sheriff, after he is *functus officio*. *Id.*

8. A Sheriff's bond taken under an order of Court, *payable to him as Sheriff*, for the price of property sold, gives him no right to the bond in his former capacity of Sheriff, when he has resigned, as the legal agent of the parties interested, and less so in his individual capacity. *Buisson v. Hyde et al.*, on a re-hearing, 17 L. R. 22.

9. Where a bond is taken by the Sheriff in his official capacity, although it be not payable to his successors in office, yet on his resignation his successor ought to be the official depositary of the bond. *Id.*

10. A Sheriff having ceased to be a public officer, has no longer any right to keep, or collect any bonds given to him as Sheriff, in execution of any order of Court. *Id.*

BOUNDARY.

1. An action of boundary lies not only where two contiguous estates have never been separated, but also where the old boundary is effaced and can no longer be seen. *Zéringue v. Harang's administrator*, 17 L. R. 349.

2. Where vestiges of the ancient boundary between two plantations are to be seen, new posts should be fixed, but they must be placed where the former limit or fence stood, without regard to the title papers. *Id.*

3. The Southern and Southerwest boundary of the county and parish of Natchitoches runs from the junction of the *Rigolet de Bon Dieu* and Red River, in a direction as far South of West as will strike the Sabine River at the point where the North-West corner of the county of Opelousas touches the Western bank of that stream. *Lecomte v. Smart*, 19 L. R. 484.

4. In settling and determining boundaries not fixed by actual observation and survey, some weight must be given to the general understanding and common acquiescence. *Id.*

BROKER.

1. Uncurrent money left in the hands of a broker to sell at a discount, and taken by an other broker, having dealings with and a creditor of the first, under pretence of selling it; he cannot appropriate it in payment of his debt without the consent of the other; but the true owner and original depositor will recover its value in his hands. *Lallande v. McMaster*, 16 L. R. 527.

BROKERS.

1. Brokers are not *licensed* in this State, and, as such, are unknown to our law. *Nott & Co. v. Papet et al.*, 15 L. R. 306.

2. Brokers in this State buy and sell paper on their own account and that of others, and must be responsible as all other individuals. *Id.*

3. And where a broker failed to disclose his principal at the time of sale of a promissory note; or show who he was at the trial, he was considered as having sold the note on his own account, and held responsible for its genuiness. *Id.*

CAPIAS AD SATISFACIENDUM.

1. Bail are not entitled to a notice of a *capias ad satisfaciendum*; issued against their principal. *Valentine v. Christie*, 1 R. R. 298.

2. The act of the 28th March, 1840, having abolished the *capias ad satisfaciendum*, no such writ could be executed, though in the hands of the sheriff at the time of the passage of the act. *Frey and another v. Hebenstreit and another*, 1 R. R. 561.

3. A sheriff cannot be made liable for failing to return a *capias ad satisfaciendum*, where the writ was abolished before the return day. *Id.*

CARRIERS.

1. Steamboats, carrying passengers for hire, should be furnished with what is requisite or usual for the safety of those on board. *Lobdell v. Bullitt*, 13 L. R. 348.

2. So, where a steamboat was destitute of a yawl, and of ropes to throw to the assistance of persons falling over board: *Held*, that the owner is liable for the value of a slave of one of the passengers, who fell overboard and was drowned; the officers and crew using no exertions to save him. *Id.*

3. Partnership or unincorporated companies for the purchase and sale of personal property, and for carrying it for hire in ships or other vessels, are commercial partnerships, and the stock holders are bound *insolido* for the debts of the company. *Vigers et al. v. Sainet*, 13 L. R. 300.

4. Owners of steamboats carrying freight and passengers are commercial partners; and in liquidating the partnership affairs, when some of the partners are insolvent, the other partner cannot withdraw his share of the proceeds of the sale of their steamboat until the partnership debts are first paid. *Claiborne et al. v. Their creditors*, 13 L. R. 279.

5. Art. 2939 of the Civil Code applies to common carriers; and so does art. 2938, under certain modifications. *Bailey v. Stewart*, 1 R. R. 410.

6. The master and owners of a vessel are not responsible for damage to the cargo occasioned by the perils of the sea, where no proof is adduced of want of care in stowing. *Lemaître v. Merle*, 2 R. R. 402.

7. As a general rule, where goods are acknowledged to have been received in good order, and are delivered in bad, the carrier will be responsible; but he may show that the damage arose from causes which existed before the bailment, or from the defects of the thing itself. *McIntosh v. Gastenhofer*, 2. R. R. 403.

CASHIERS OF BANKS.

1. The authority given by law to the cashiers of Banks to execute acts of pledge, confer on those officers only the powers of Notary public in relation to those contracts; and none of the forms essential to the contract can be dispensed with. *Robinson v. Shelton*, 2 R. R. 277.

CERTIORARI.

1. Where the certificate of the clerk shows that parole testimony,

taken on the trial, but not reduced to writing, is not to be found in the record, and there is no statement of facts, the appellant cannot be relieved by a *certiorari*, as it appears from the certificate of the clerk that he cannot send up the evidence. *Roberts v. Benton*, 2d cases, 1 R. R. 100.

CITATION.

1. An informality in the citation, and an order of Court requiring a new one, does not operate a discontinuance, so as to require payment of costs by the plaintiff before the case proceeds. *Lapice v. Smith*, 13 L. R. 91.

2. A return of service of petition and citation, which states that they were left with W. F. a free white person over fourteen years of age, residing *at the domicile of the defendant*, is insufficient. If he be absent, citation must be left *at the defendant's domicile*, with a free person apparently above fourteen years of age, residing there. *Ballard et al., v. Lee's administrator*, 14 L. R. 211.

3. If a judgment by default be taken before the defendant is in Court, by proper service of citation, although he be afterwards personally cited, final judgment cannot be entered without a judgment by default being again taken. *Id.*

4. It must appear by evidence, that the appellee resides out of the State at the time of service of citation on his attorney, or it will be insufficient. *Ratliff v. his creditors*, 14 L. R. 292.

5. Service of citation on defendant's wife at his domicile is sufficient. *Bryan's administrator v. Spruell*, 16 L. R. 313.

6. Although the seal of the Court does not appear to the citation as it is copied in the record, *non constat*, that it was not affixed to the original. *Id.*

7. A return that citation and petition were served on the defendant by leaving the same at his domicile with G, his agent, he being absent, is insufficient: it not appearing that G was living in the house, or where the domicile or house of the defendant is situated. *Pilié v. Kenner*, 16 L. R. 570.

8. It will suffice to make service of citation on the agent, if the agency appear in or by the petition, but not otherwise. *Id.*

9. The return of service of citation by leaving it at the *usual domicile* with a free white person, apparently above the age of fourteen years, is insufficient, when it appears from the evidence the defendant had *removed* to an other parish; and because it does not state that the person with whom citation was left was living in the house. *Spark v. Weatherby*, 16 L. R. 594.

10. In this case there were two persons of the same name, but service of citation was made on the wrong one, and the suit discontinued as to him; the other could not be sued by a mere amend-

ment to the petition and adding the word *junior*, without any new service of citation. *Dixon v. Kennard & Shields*, 17 L. R. 468.

11. A citation addressed to and served on the agent of the defendant, when the latter is absent from the State, is sufficient to authorize a valid judgment as to the principal. *Cazeau v. Lesparre*, 17 L. R. 498.

12. A sheriff is presumed to be acting in and executing the process of his own parish, where the contrary is not shown; and he is not required to insert the name of his parish in his returns or in making service of citation. *Kendrick's heirs v. Kendrick*, 19 L. R. 36.

13. The law dispenses with *personal* service, when the defendant is absent; but the sheriff's return must state expressly, that he left the process *at the usual domicil* or residence, with a free person above fourteen years of age, *living there*; the defendant being absent. *Id.*

14. The citation should state, that the answer is to be filed within ten days after service; allowing *one day* for every ten miles distance from the residence of the defendant to the clerk's office. *Id.*

15. Where there is no evidence that the defendant had more than one domicil, it is unnecessary to state in the sheriff's return, that service of citation was made at his usual domicil. *Griffin administratrix v. Caldwell and others*, 1. R. R. 15.

16. It is not necessary that it should appear from the sheriff's return, that the copy of citation served on the defendant was sealed with the seal of the Court and certified by the clerk to be a true copy. *Id.*

17. Service of citation must be accompanied with that of a copy of the petition. The latter, is the only document from which the defendant can ascertain the demand with which he is required to comply. *Harris, for the use, &c. v. Alexander and another*, 1 R. R. 30.

18. Service of citation on any member of a commercial partnership, will be binding on the rest. *Byrne v. Hooper*, 2 R. R. 229.

19. It is not necessary that a citation should contain the name of the judge of the Court from which it is issued, art. 179 of the Code of Practice enumerates all the requisites of a citation. *Hemkem v. Farmer*, 3. R. R. 155.

20. The formalities prescribed by art. 254 of the Code of Practice, which requires where the defendant has no known place of residence, or conceals his person, or is absent, or resides out of the State, that the sheriff shall serve the citation by affixing a copy thereof to the door of the Parish church of the place, or to that of the room where the Court in which the suit is pending is held, stand in the place of citation, and form the basis on which all subsequent proceedings must rest and this omission will be fatal. Service of citation on the defendant, is the first step to be taken.

Putnam v. Grand Gulf Rail Road and Banking Company, 3. R. R. 232.

CITY COURT OF NEW-ORLEANS.

1. The City Court of New-Orleans is without authority to grant an order of seizure and sale ; especially when the property to be seized is situated out of the city limits. *Elwyn v. Jackson et al.*, 14. L. R. 411.

2. But the jurisdiction of the City Court does not extend to actions of a *real nature*. It is limited to actions *in personam* ; except in cases of attachment, in which authority is expressly given. *Id.*

CLAIMS ON GOVERNMENT.

1. In the seizure and prosecution of a vessel for the violation of the law, by the collector, surveyor and naval officer, in a case where no law provided for their remuneration, they rendered meritorious services, but these impose no obligation on the government, either in law or equity, to compensation ; and which could not be set up either as a legal or equitable offset to any demand of the government against *them* ; although under the rules of law, any specific demand, imposing even an equitable obligation, might be so pleaded. *Emerson's heirs v. Hall*, 14 L. R. 1.

2. Services rendered under the requirements of a contract, or of law, for which a compensation is fixed, constitute a legal demand, while those rendered under an authority which is casual, or in some degree discretionary, may constitute an equitable claim. *Id.*

3. A claim against a foreign government for spoliations, is founded on the law of nations, and the obligation is perfect on the offending government, which will be enforced by the government of the injured citizen. *Id.*

4. A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle, it cannot be assigned. It does not go to the administrator as assets, and it does not descend to the heir. But if the government, from motives of public policy, or any other consideration, thinks proper to make a grant of money to the *heirs of the claimant*, they receive it as a gift or a pure donation. *Id.*

CLERK OF COURT.

1. Clerks of Courts cannot certify any thing done in the prosecution of a suit, otherwise than by a copy of the minutes or re-

cords, unless specially authorized by law. *Taylor's administrators and another v. Jeffries administrators*, 1 R. R. 1.

2. It is not necessary in granting an injunction that the judge should state in his order into what Court it is to be made returnable. It is the duty of the clerk to issue the writ according to law. *Stanbrough v. Scott, sheriff and another*, 1 R. R. 43.

3. It is not enough that a clerk certify the result of the action of a Court; he must make copies of what appears on the records, of which he is the keeper. *Succession of Bowles*, 3 R. R. 33.

CLINTON & PORT HUDSON RAIL ROAD Co.

1. The charter of the Clinton and Port Hudson Rail Road Company empowers the Company to transfer, for any legal purpose, notes belonging to it. *Myers v. de Lee*, 1 R. R. 516.

2. The provisions of the second section of the act of 26th March, 1842, directing all judicial proceedings by individuals against the Clinton and Port Hudson Rail Road Company to be stayed, must be understood as suspending such proceedings, pending a suit by the State for the forfeiture of its charter, in order that no one creditor may gain an undue advantage over the rest, such a temporary stay of proceedings, does not impair the obligation of contracts. It is a conservatory measure only. Otherwise, were the clause interpreted as directing a stay of all proceedings from the promulgation of the act for an indefinite period, upon the mere authority of the Legislature. *State v. the Judge of the 3d. District*, 2. R. R. 307.

CIVIL LAW.

1. The repeal of the Roman, Spanish and French civil law, in the article 3521 of the Louisiana Code, and the repealing act of 1828, only embrace the positive, written or statute laws of those nations and of this State, such as were introductory of a new rule; and did not abrogate the established *principles* of law settled by the decisions of Courts of Justice. *Reynolds v. Swain et al.*, 13 L. R. 193.

2. The principles settled in the case of *Christy v. Cazanave*, 2 Martin N. S. 451, making tenants who abandon their leases *liable at once*, for the rent of the whole term, although drawn from the Roman Civil Laws, which have no intrinsic authority here, yet the reason of them has great cogency in the elucidation of principles applicable to analogous cases. *Id.*

CLERKS.

1. The art. 782 of the Code of Practice, authorizes clerks to appoint deputies, who are to take an *oath before the Court in which they act*; but when the clerk of the District Court is *ex officio* clerk of the Parish Court, his deputy may *swear in*, in either Court, and the law is satisfied. *Bank of Louisiana v. Watson*, 15 L. R. 38.

2. The deputy clerk is an officer known to the law, and the Court will take notice of his acts, when signing himself, as deputy clerk, without using the name of his principal. *Id.*

3. Clerks of Courts have no authority *out of the presence of the Court*, to swear witnesses and take down their testimony in a cause. They are only to administer oaths in open Court; and out of it in cases of arrest, attachment, provisional seizure, or generally, in any conservatory measure required by one of the parties to a suit. *Sandeman v. Deake & Willard*, 17 L. R. 332.

4. Clerks of Courts are bound to make complete records and append thereto *the proper and true certificates*, and their neglect and disregard of these duties will not be tolerated by this Court. *Bayne v. Fox*, 18 L. R. 80.

5. The certificate of the clerk of a Court cannot be taken as proof of the *purport* of papers of record in his office, much less of such as are missing. *Briggs, Lacoste & Co. v. Campbell*, 19 L. R. 524.

CODES.

1. The Louisiana Code contains definitions and points of doctrine, as well as positive legislation; and whenever there is any inconsistency in its provisions, the Court will disregard the doctrine, and consider the definitions modified by the clear meaning of the positive enactments. *Ellis v. Prevost et al.*, 13 L. R. 230.

2. The Code of Practice was framed exclusively with a view to judicial proceedings, and its provisions on the subject of general laws do not necessarily repeal those of the Louisiana Code, that are contrary to or inconsistent with them. *Id.* 237.

COLLATION.

1. Every donation, or advantage, is liable to be collated among co-heirs, unless expressly exempted by the donor. *Burton's heirs v. Burton et al.*, 14 L. R. 352.

2. So in an action of partition among co-heirs, slaves which have been given, the donee is not permitted to collate them in kind, but according to *their value, at the time of the donation*. *Id.*

COLLISION AND LOSS.

1. Where the evidence shows that a collision happened, and a

slave, mules and cart were run over and destroyed, by the fault and folly of the slave in driving across the Rail road of the defendants, when the engine was approaching and near, the owner cannot recover any thing for their loss. *Lesseps v. Ponchartrain Rail Road Company*, 17 L. R. 361.

COLORED PERSONS.

1. Children of color (*from a white person*) are not allowed to prove their paternal descent, where they have not been acknowledged; but this may be shown by proof against them by the adverse party in order to annul a sale made to them, as a disguised and simulated donation to incapable persons. *Robinett et al. v. Verdun's vendees*, 14 L. R. 542.

2. So, children of color (*from a white person*) not acknowledged, cannot inherit or receive by donation, *inter vivos*, or *mortis causâ*, even one fourth of the ancestor's estate; and, if by a disguised sale or donation, an attempt is made to give them a greater amount of property than can be legally disposed of, it is not reducible to the disposable portion, but absolutely null. *Id.*

3. Colored children of a white person, not acknowledged by him, are incapable of receiving any thing by inheritance or otherwise. *Id.*

COMMERCIAL LAW OF THE UNITED STATES.

1. The laws of Spain were not abrogated by the transfer of the territory of Orleans to the United States; but the commercial law of the latter became, by that transfer, the law of the territory of Orleans. *Wagner v. Kenner*, 2 R. R. 120.

COMMISSIONERS FOR OPENING STREETS.

1. The act of 1832, for opening streets in New-Orleans, requires that the commissioners of estimate and assessment should be *competent to serve* as jurors in the District Court; but a privilege of exemption from serving on the jury, does not render a person *incompetent* to serve as a commissioner. *Herman's heirs v. Municipality No. 2*, 15 L. R. 597.

2. The assessment of commissioners, under the act of 1832, for opening and improving streets in New-Orleans, is of their peculiar province; and like the finding of a jury, or the report of experts, it should not be disturbed except for manifest error. *Id.*

COMMISSION MERCHANT.

1. Where the plaintiff as agent or commission merchant agreed to furnish freight, for a vessel at a certain rate and 5 per cent prime thereon, and the freight was not received as agreed on; but the captain made a new contract for freight to which the plaintiff was not a party: *held*, that the latter cannot *charge* for the freight. *Laidlaw v. Tyson*, 18 L. R. 378.

2. So the consignee of a vessel *inwards* is not entitled to charge commission on the *outward cargo* as a customary charge unless he actually obtains an outward freight. *Tyson v. Laidlaw*, 18 L. R. 380.

COMPENSATION.

1. Compensation may be pleaded at every stage of the proceedings and *on the trial*, if it be pleaded specially. *Downing v. Delasize*, 13 L. R. 256.

2. Compensation cannot take place between debts which a party owes an estate under administration, and those which it owes him. He still retains his interest to make opposition as a creditor; although it may turn out, ultimately, that he is a debtor for a balance due the estate. *Duncan's syndics v. Duncan's heirs*, 14 L. R. 556.

3. A sum due the defendant by the husband, cannot be pleaded in compensation of the wife's demand in her own right. *Defau et ux v. Pelane*, 15 L. R. 273.

4. One sued as security on the promissory note of an insolvent, may plead in compensation and reconvention an amount of money due the principal debtor in the hands of plaintiff, for which the latter had given no consideration; and interest will be allowed on it from the date of the judgment. *Bronaugh v. Neal*, 1 R. R. 23.

5. Where two persons are indebted to each other, compensation takes place from the moment the two debts co-exist. They extinguish each other, by the mere operation of law, to the amount of their respective sums. *Wood v. Boyers*, 2 R. R. 130.

COMPENSATION OF DEBTS.

1. A debt exists from the time it is contracted or *is due*; and not from the date of the judgment *only*, rendered thereon. *Bach v. Twogood et al.*, 18 L. R. 414.

2. So, where the plaintiff's demand *existed* anterior to notice of the transfer of defendant's debt against him, it will compensate and extinguish it as against the original creditor, notwithstanding he transferred it to a third person, before the plaintiff obtained judgment on his demand. *Id.*

COMPENSATION AND RECONVENTION.

1. Pleas in compensation or reconvention should be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were himself a plaintiff in a direct action. Compensation must be specially pleaded. *White v. Moreno*, 17 L. R. 371.

2. Reconventional demands for damages for the wrongful suing out of an injunction and false imprisonment, cannot be pleaded and set up in a possessory action; they are independent and distinct from it and foreign to the cause on which it is based. *Morgan v. Driggs et al.*, 17 L. R. 176.

COMPROMISE.

1. A compromise by a tutrix will not be binding on the minor unless subsequently ratified by the latter. *Nantz v. Wyatt and others*, 1 R. R. 10.

2. Authority to an agent to settle or compromise a debt, does not empower him to bind his principal to defray the costs and incur the responsibility of collecting notes, offered to him in settlement by the debtor. *Dixon v. Ford and another*, 1 R. R. 253.

3. A compromise regulates only such matters, as it clearly appears that the parties intended it should embrace, and the necessary consequences thereof. *Perret and another v. Keill and another*, 1 R. R. 307.

4. The power to compromise, must be express and special. C. C. 2966. *Bonneau v. Poydras*, 2 R. R. 1.

COMMUNITY.

1. In settling a community between a surviving partner and the heirs of the deceased, reference must be had particularly to the situation of the affairs of the community at the time of its dissolution. No evidence will be received of the amount of property in possession, after the dissolution of the community, *except at the time*, nor at the time of the second marriage of the surviving partner. *Thibodeaux's heirs v. Thibodeaux*, 16 L. R. 40.

2. Where the object of the suit is to obtain a settlement and liquidation of the community formerly existing between the deceased husband and surviving wife, and for a partition of the residue, after the payment of the common debts, the Courts of Probate have exclusive jurisdiction. *Lawson et ux. v. Ripley*, 17 L. R. 238.

3. Courts of Probate have *not exclusive* jurisdiction in suits for

the purpose of dividing property belonging to a legal partnership or community between the surviving spouse and the heirs of the deceased one; but the District Court has concurrent jurisdiction in such cases. *Lawson et ux. v. Rigley*, 17 L. R. 238.

4. The marriage contract between the deceased spouse and defendant is admissible in evidence, although not specially pleaded, in a suit for the settlement of the community affairs and partition thereof. *Id.*

5. When the title to property brought into marriage had vested in the party, although not paid for, it became his separate property, and remained such at the dissolution of the community. *Id.*

6. Slaves received during marriage, by one of the spouses, *in exchange*, or *in payment* of money due him on his separate and individual right, do not become community property. *Id.*

7. Where a house and lot the separate property of the wife, is mortgaged by the husband and wife for improvements and ameliorations put on them, *these last* become part of the community of acquets and gains, and are liable for the husband's debts. *Dominquez v. Lee et al.*, 17 L. R. 296.

8. Property, purchased under the husband's own judgment, becomes part of the community; although it may entitle him to the *price* which he paid for it, as a charge in the settlement of the community. *German et ux. v. Nicholls et al.*, 18 L. R. 361.

9. Property received as a donation from the Spanish Government by one of the spouses. does not enter into the community; but remains his separate property, and descends to his heirs as such. *Fuselier's heirs f. p. c. v. Masse's heirs, f. p. c.* 19 L. R. 329.

10. Property purchased during the marriage by the husband, in his name, though bought with the funds of the wife, belongs to the community. So a slave received by the husband in his own name, in discharge of a sum, which the wife inherited, is community property, as likewise the increase of the slave after the sale. *Comeau v. Fontenot*, 19 L. R. 406.

11. It has been held, that property acquired by the wife, as a *dation en paiement*, made to her by her tutor, and which never came under the administration of her husband, constitutes the wife's separate property; and does not belong to the community but is paraphernal. *Id.*

12. Where a woman has her domicil here, and marries in another State, it does not prevent a community of acquets and gains from existing, when the parties afterwards remove to Louisiana. *Rowley v. Rowley*, 19 L. R. 558.

13. In a judicial sale of property for a partition among several heirs, the husband of one of them may purchase the entire property sold, which becomes community from that time; he being responsible to the wife for the price of her share only. *Id.*

14. Where in a purchase by the husband, the portion of the wife in the estate sold, is imputed to the extinguishment of the price to be paid by him, he is bound to her for it, with a legal mortgage to secure it, if he administers her paraphernal estate. *Rowley v. Rowley*, 19 L. R. 558.

15. If the wife have a fortune, and is in the administration of it, and the husband little or none, she is bound to pay or contribute at least half of the matrimonial charges. *Id.*

16. The wife is not entitled to interest on recovering her paraphernal property, when the husband administers it, or when it is administered indifferently by the husband and wife; as the fruits of paraphernal property except the young of slaves belong to the community. *Id.*

CONFLICT OF LAWS.

1. An obligation executed here, and made payable in Mississippi will be governed by the laws of that State regulating the rate and payment of interest accruing after maturity. *Lapice v. Smith*, 13 L. R. 91.

2. A statute of another State, authenticated by the great seal and the certificate of the secretary of State, is admissible in evidence here, as the law of that State. *Id.*

3. The power of the husband over the wife, and her capacity to sue, ratify or make a contract, is fixed by the law of their domicil. *Garnier v. Poydras*, 13 L. R. 177.

4. So where the wife resides in France, and is separated in bed and board from her husband, in order to sue and enforce her legal rights in Louisiana, she must be *authorized* according to the laws of France to institute suit. *Id.*

5. Where a debtor absconded from his creditors in France, came to Louisiana, and soon after died, where his succession was opened and administered: *held* that no other domicil but his original one in France, can be assigned him, as he manifested no intention of establishing himself here. *Gravillon v. Richard's executor*, 13 L. R. 293.

6. The power of our Courts to order the remission of funds belonging to a foreign succession opened here, to the representatives of, and creditors authorised to receive them, by the Courts of the domicil of the deceased is undoubted, and every motive of public policy requires such transmission for distribution. *Id.*

7. The decree or judgment of a foreign Court, the jurisdiction of which not having been questioned, will be considered conclusive on the matters adjudged by it. *Brosnaham et al. v. Turner*, 16 L. R. 433.

8. The validity of a legislative enactment of an other State, or foreign country, where it operates on property within its jurisdiction, or when it authorizes and confirms the acts of its own officers, will not be inquired into by the Courts of this State; but its extra-territorial effect on rights to immoveable property in this State will not be tolerated. *Brosnaham et al. v. Turner*, 16 L. R. 433.

9. The evidence of a fact, happening in a different contry from that of the *lex loci contractus*, must be tested by the rules of evidence in the State where the remedy is sought *L. & T. F. Shewell v. Raguet*, 17 L. R. 457.

10. So the testimony of one witness, that a debt contracted in Pennsylvania exceeding 500 dollars in amount, was acknowledged by the debtor in his presence, in Texas, is *insufficient*, without some corroborating circumstances, to make proof of and establish the demand in a Court of Louisiana. *Id.*

11. The general principle is, that contracts in regard to *personal* property, must be regulated by the *lex loci* of the domicil of the owner. But as relates to the remedies of creditors, personal property has a *situs*, a locality, which subjects it to the law of the country where it is situated, when there is a conflict. *Beirne & Burnside v. Patton et al.*, 17 L. R. 589.

12. So, an assignment made by debtors residing in Tennessee for the benefit of their creditors, of certain cotton in New-Orleans, which is void under our laws, will not have effect as against an attaching creditor here who is no party to it. *Id.*

13. Where a contract is either expressly or tacitly to be performed in another place than that where it is made, it is to be governed by the law of the place of performance. *Id.*

14. A particular legacy here, by the law of Scotland would be considered as a *pure bequest* of a sum of money, and not of heritable property, which if made by a person in Scotland to a citizen of Louisiana, the Courts of law in that country will give effect to the legacy. *Duke of Richmond et al v. Milne's executors*, 17 L. R. 312.

15. A statute of this State derogating from the established rules of evidence among nations, will be executed and obeyed as to contracts made in other States, when they are sought to be enforced here. *Buckner, Stanton & Co. v. Watt*, 19 L. R. 216.

CONFUSION:

1. To an action by the commissioners appointed under the act of 14th March, 1842, for the liquidation of a Bank, for the amount of a due bill, defendants pleaded in compensation a check in their favor, for an equal amount, drawn on the Bank by a depositor. The check was presented for payment on the 10th of March. A

writ of sequestration had been issued against the Bank on the preceeding day, but the judgment, declaring the forfeiture of its charter, was rendered on the 11th of the same month, and not signed until the 15th. *Held*, That the debts were extinguished by confusion on the 10th, when defendants, who were debtors for the amount of the due bill, became creditors for that of the check. *Commissioners of the Atchafalaya Rail Road and Banking Co. v. Beau*, 3 R. R. 414.

CONSIGNEES AND FACTORS.

1. Where cotton is shipped to dry-good merchants, with instructions to be sold on the levee, if ten and a half cents a pound could be had, and if not, to store it, and the consignees immediately employ a broker to sample it, but not finding a buyer it is stored and soon after *destroyed by fire*: *held*, that the consignees *are not liable*; although it is admitted the market price at the time of the arrival of the cotton was twelve and a half cents per pound. *Gillet et al. v. Theall*, 16 L. R. 46.

2. The consignees being dry-good merchants, are considered as having used sufficient diligence by forthwith employing a cotton broker to effect a sale. *Id.*

3. Where factors or commission merchants receive a general power to sell, free of all limitations as to price, they cannot be made responsible for any thing they may have done afterwards with a good intention. *Lesesne & Edmondson v. Cook*, 16 L. R. 58.

4. A factor who acts in good faith, is not responsible for errors of judgment. The circumstance of the factor being a creditor of the shipper or consignor, and the necessity of advances being covered, will not justify a sale below the limited price. *Id.*

CONSTITUTIONALITY OF LAWS.

1. It is always with reluctance the Court pronounces on the unconstitutionality of laws, and especially those of a sister State, and where the judicial tribunals of the State have pronounced on their validity, this Court will recognize them as constitutional. *Bank of Illinois v. Sloo & Byrne*, 16 L. R. 539.

CONTINUANCE.

1. The granting a continuance is in the discretion of the judge *a*

quo, who best knows the parties and their attorneys; although, if a continuance be improperly refused, this Court has power to grant relief; yet, it will not interfere in a case where the discretion of the inferior judge has been correctly exercised. *Hopkins et al. v. Laplace syndic &c.*, 14 L. R. 141.

2. Where an absent witness has been duly summoned, and the party makes affidavit setting forth his materiality, and the material facts expected to be proved by him, and that he expected his attendance on the day fixed for trial, it will be sufficient ground to obtain a continuance. *Klathenhoff v. Ardry*, 14 L. R. 301.

3. An affidavit, for a continuance on account of the absence of a witness, which does not state that his departure was unknown to the affiant, and that his testimony could not be had, is insufficient. *Bank of Orleans v. Whittemore*, 15 L. R. 276.

4 Where the defendant's witnesses failed to appear on being attached, and the counsel asked for time to send for his clients that they might make the necessary oath for a continuance, and tendered his own affidavit, all of which was objected to and declined: held, that the continuance was properly refused. *Lizardi et al. v. Arthur & Fulton*, 16 L. L. 577.

5. Where the party whose witnesses fail to attend, is necessarily absent from the State, the affidavit of his attorney for a continuance may suffice, although his knowledge of the facts sworn to is derivative. *Id.*

6. Where a party had full time to secure the attendance of his witnesses, and a continuance refused, coupled with the declaration of the judge *a quo*, that due diligence was not used to obtain his attendance, the judgment will not be disturbed. *Capdeviel v. Dodd et al.*, 17 L. R. 149.

7. In an application for a continuance, much reliance will be placed in the discretion of the judge *a quo*; and unless positive injustice has been done, his judgment will be affirmed. *Id.*

8. Where the party takes his commission six months before trial to procure testimony, and makes no effort to obtain it, he has not used sufficient diligence to obtain a continuance. *Rogers v. Davis*, 18 L. R. 50.

9. A continuance will not be allowed because a public officer is called as a witness with his records at the moment of trial, and his records are locked up, his clerk having the key and absent at the time. *Slidell v. Locke*, 18 L. R. 461.

10. An affidavit, by counsel, stating the absence of the defendant, but that the latter expects to prove certain facts by a witness, and has used all diligence to obtain him, is insufficient to grant a continuance. *Burton v. Maltby*, 18 L. R. 531.

11. A continuance will not be allowed, when due diligence has not been used to obtain the testimony of a witness, alleged to be material. *R. McCarty v. J. P. McCarty*, 19 L. R. 296.

12. Motions and affidavits for continuances are addressed to the

legal discretion of the Court, and should be granted or denied, so as to effect a speedy termination of suits, as far as is consistent with justice. *B. McCarty v. J. P. McCarty*, 19 L. R. 296.

13. It is no ground for a continuance, that a witness is insane, and time is asked, that he may recover, and his disposition be taken; especially when it is not shown he would be able to testify in a reasonable time. *Anderson's administrator v. Birdsall's administratrix*, 19 L. R. 441.

14. When the answer sets up a special contract, a continuance need not be allowed for the party to procure the testimony of a witness, as it is unimportant to the defence to prove one. *Id.*

15. Upon affidavit made, and in consideration of its being the first term, a continuance should be allowed; but if on appeal it appears, that by the admissions of the adverse party, &c., no injury is sustained by going to trial, the case will not be remanded on this account. *Rowley v. Rowley*, 19 L. R. 557.

16. An affidavit for a continuance, on the ground of the indisposition of the principal counsel, unaccompanied with any allegation that he was in possession of papers necessary on the trial, will be disregarded, where the circumstances of the case induce the belief that it was made for delay. *Hooper v. Hyams, executor*, 1 R. R. 90.

17. To entitle a party to a third continuance on the ground of the absence of the same witness, he should show the materiality of the testimony, and such extraordinary diligence as to satisfy the Court that it was absolutely impossible to procure the evidence. *Gay v. Kendig*, 2 R. R. 472.

18. In an affidavit for a continuance, on the ground of the absence of a witness, a statement "that the witness has left the city for a few days," is equivalent to an allegation that he is expected to return at the expiration of that period, and will be sufficient. *Harrison v. Waymouth*, 3 R. R. 340.

19. Where, on an application for a continuance, defendant swears, that he expects to prove by a witness, who is absent, "that plaintiffs had caused great damage to him by their illegal conduct, that he is not indebted to them, and that he cannot safely go to trial without his testimony," the circumstance of his having other witnesses to the same facts, ought not to deprive him of the benefit of a continuance; for the absent witness might have the means of speaking more positively than the others. *Id.*

CONTRACT.

1. Where the plaintiff purchased certain cotton, and made advances on the bill of lading, and the cotton was delivered to the defendants under a previous contract with the seller, before the bill

of lading came to the plaintiff's hands, he cannot recover, although defrauded by the seller. *Hepburn v. Lee & Hardy et al.*, 14 L. R. 76.

2. The bill of lading could have no effect until its delivery ; and at that time the cotton being in possession of the defendants, under a previous contract, having no connection or privity with the one under the bill of lading, they are in no way responsible. *Id.*

3. The party claiming damages for loss of rent, occasioned by the non-delivery of a house according to contract, must show that he put the adverse party in default before he can recover. *Kirkman v. Barton*, 14 L. R. 80.

4. The form of a contract of sale may be given to a different contract as a mortgage, when the property is absolutely conveyed. Between the parties to the conveyance, its real nature must be established by a counter-letter ; but those who are not parties to the contract, and have an interest in establishing its real nature, may do so by testimony. *Frost & Johnson v. Bebout et al.*, 14 L. R. 104.

5. According to a statute law of Mississippi, all notes made there are subject to every equitable defence against a *bona fide* endorsee, which could be set up against the payee ; and when sued on here, the case must be governed by the *lex loci contractus*. *Barrett v. Walker*, 14 L. R. 303.

6. Where a vendee has not complied with his agreement, he cannot complain and set up as a matter of defence to his note, that the vendor has not extinguished a certain mortgage, when this failure was the consequence of his not complying with his stipulation to pay in a certain manner. *Id.*

7. Where a vendor and mortgagee goes before a notary and makes a declaration of release of his mortgage on certain conditions, it cannot have the force of a contract, without the assent of the mortgagor, although the stipulation is in his favor. But the declaror is bound to carry into effect the intention expressed, whenever the other party signifies his readiness to accept the terms offered, if they have not been retracted. *Williams v. Duer*, 14 L. R. 523.

8. Where an undertaker gave an order on the owner to the plasterer, payable out of the second and third instalments of the contracts for building, when the house was finished, and which was accepted by the owner : *held*, that no subsequent agreement between the undertaker and owner, prolonging the time of finishing the house, could change the obligation of the acceptor of the order ; and, although the house was destroyed by fire in the mean time. *Sargeant v. Daunoy*, 14 L. R. 43.

9. Neither party to a contract has any power to change his obligation to a third party growing out of said contract, by subsequently altering or prolonging its execution, as between themselves, *Id.*

10. Where a building contract is modified at the instance of the proprietor, and a plasterer is employed, separate from the contract with the builder, he will be entitled to recover of the proprietor independently of the original contract with the builder. *McIntosh v. Clannon*, 18 L. R. 469.

11. Where a creditor takes goods of his supposed debtor in his absence, and sells them at a sacrifice, he is chargeable with them at the *price limited* by the consignor. *Stanton v. Cox's syndic*, 18 L. R. 508.

12. Where a party declines a compliance with his part of the contract, the institution of a suit, claiming performance of the contract or damages in the alternative, is a sufficient putting of the defendant *in morâ*, if any was necessary. *New Orleans and Nashville Rail Road Co. v. Ganalh & Co.*, 18 L. R. 510.

13. It would even be an idle ceremony for one party to do certain acts on his part before suing for a breach of the contract, after the other declines complying with it on his part. *Id.*

14. Where the defendants refused a compliance with their contract for reasons wholly unconnected with the conduct of the plaintiffs, they are liable for damages. *Id.*

15. When the period within which a certain condition is to be performed has not yet arrived, the party is not *in morâ*, and the complaint of non-compliance is premature. In the mean time the adverse party must perform his part of the contract. *Priollaud v. Hurst et al.*, 18 L. R. 537.

16. Where materials were furnished and work done on the defendant's premises and for their benefit, they are bound to pay the value, although the work was not stipulated for in the contract for other work done at the same time. *Giraghty v. Saulet et al.*, 18 L. R. 539.

CONTRACTS.

1. In commutative contracts, it is the duty of the party claiming damages for non-performance to show that he offered to perform his part at the time implied in the contract, and that he has put the adverse party in default. This is a pre-requisite to the recovery of damages. *Vance v. Tourné & Beckwith*, 13 L. R. 225.

2. The damages occasioned at the time of the default or breach of the contract, are the only damages that can be recovered. *Id.*

3. In an action by the vendee for a breach of contract of sale by the vendor in not delivering the article, the measure of damages is the price of the article *at the time* of the breach of the contract. *Shepherd et al., v. Hampton*, 3 Wheaton, 200. *Id.*

4. In a contract of sale of plantation and slaves, in which the vendee paid four thousand five hundred dollars in cash, and on the

vendor's stipulating to make a title, the 1st. January following the balance was to be paid, but on failure of the vendee to comply, the sum paid was to be forfeited to the vendor to indemnify him for the chances of a better sale : *held*, that the contract was absolute, but no more than the sum paid could be exacted from the vendee on his failure to pay the price, and that the sum paid was forfeited. *Noe v. Taylor*, 13 L. R. 249.

5. When the resolutive condition in a contract depends on the will of either party, the contract is not dissolved of right by the happening of the condition, but its dissolution must be sued for in all cases, when it embraces immoveable property. *Id.*

6. Good faith in a contract is always presumed, and the Court will consider itself bound to believe the contracting parties understood each other, and that the vendor disclosed the truth in relation to the thing sold, when it is not otherwise shown. *Id.*

7. The acceptance of a contract need not be expressed in the instrument, or signed by the party. It results from his acts in availing himself of the stipulations in the contract. *Amory et al., v. Black*, 13 L. R. 264.

8. Although parole evidence is not admissible to prove a written contract, yet it will be received to prove acts done by the parties in execution of it. *Id.*

9. Where an architect enters into a written contract in a penalty, to erect a block of brick stores and dwellings *within three months after the granite is put up*, and with a knowledge of a contract between the owner and another person to put up the granite : *held*, that the epoch, when the last granite sills were set, is to be considered the time when the three months began to run, and not when the basement story was completed. *Gallier v. Jonau, f. m. c.* 13 L. R. 309.

10. The putting up of the granite windows and doors cannot be excluded from the contract, but must be considered part of it, when not expressly reserved by the parties. *Id.*

11. Where the defendant gave up the practice of law in New-Orleans, and entered into a contract with the plaintiff, by which he removed to East Baton-Rouge, and took upon him the cultivation of an estate and plantation, in conjunction with the plaintiff's son : on a disagreement between the parties, the contract was dissolved, and the plaintiff sued to recover possession of the estate : *held*, that the defendant cannot recover damages for the loss of his practice in New-Orleans, as for a breach of the contract. His absence was not the consequence of a breach of the contract by the plaintiff, but of the contract itself. *Williams v. Barton*, 13 L. R. 404.

12. Damages for a breach of contract are those which are incidental to and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of making it. *Id.*

13. In reciprocal contracts, he who desires to comply when the other delays, must, at the proper time offer to perform his part, to put the other in default. *Oxnard v. Locke et al.*, 13 L. R. 447.

14. Joint purchasers cannot be condemned *in solido* for the payment of the price. *Id.*

15. A party, performing his part of a contract in good faith, will be allowed the full value of his performance and such damages as he may sustain by a breach of the contract by the adverse party. *Bach v. Lafayette City Council*, 13 L. R. 549.

16. A party must be put in default before damages can be claimed for the non-compliance of reciprocal obligations. *Armstrongs v. Baldwin syndic, &c.*, 13 L. R. 564.

17. Where a contract grows out of, and is connected with an illegal or immoral act, or is in part only connected with the illegal consideration, and growing immediately out of it, though it be a non-contract, it is equally tainted, and a Court of justice will not lend its aid to enforce it. 11 Wheaton, 258. *Hernandez et al. v. Babcock's executors*, 13 L. R. 587.

18. Under the Roman law, no resolutive condition was implied in the contract of sale. If the *pactum commissorium*, was not expressly stipulated, the vendor had no right to take back his property if the price was not paid; with such a stipulation, if the price was not paid at the appointed time, the sale was void. *Canal Bank et al. v. Copeland*, 15 L. R. 75.

19. Under the Louisiana law, the effect of the *resolutive clause implied* in all synallagmatic contracts, is not to render the contract void, *ipso facto*, but only *voidable*, on the demand of the party complaining. *Id.*

20. Where the purchaser of a plantation and slaves, under mortgage for Bank stock, stipulates that the seller may reserve certain slaves, and he (buyer) will put in others, and assumes her obligations to the Bank, he cannot claim a rescission of the sale on an exception to her right to proceed against the plantation and slaves, for the price, or damages in a direct action, on the ground, that she (the seller) has not transferred the Bank stock; until he puts her in default, by showing a readiness and offer to perform, on his part, what by the contract he was first bound to do, or at least simultaneously. *Dawson v. Duplantier*, 15 L. R. 289.

21. When no time is fixed by a contract, within which the mutual stipulations are to be performed, either party may claim an immediate performance, according to its terms, and in the mode pointed out by law for enforcing similar reciprocal engagements. *Id.*

22. The same relief will be extended to an innocent party who has become responsible for the contracts of an other, by accepting his draft and giving him his credit, as to a surety, who even before payment, may demand to be indemnified by the principal debtor, when the latter is in a state of insolvency. *St John et al v. Sanderson : Cochran intervenor*, 15 L. R. 346.

23. A contract, or agreement which has never been perfected, and not having been adhered to and signed by all the contemplated parties, is not binding on those who have signed. *Faures v. Coinçon*, 15 L. R. 436.

24. A marriage contract passed before a justice of the peace, is null; and any gifts or donations made under it are null and void. *Flores v. Lemée, administrator*, 16 L. R. 271.

25. A claim or contract for an overseer's wages, over five hundred dollars, is fully proved by one witness and the corroborating circumstance of the defendant's written declaration, that he would and did *discharge* the overseer. *Nelson v. Botts*, 16 L. R. 596.

26. An obligation or contract without a cause, or with a false or unlawful one, can have no effect; and the law will give no action to enforce it. *Gravier's curator v. Carraby's executor*, L. 17 R. 118.

27. No action can be maintained on a contract the consideration of which is wicked in itself or prohibited by law. *Id.*

28. So an agreement or contract that property which had been conveyed to persons to secure them for advances and protect the transferor from the pursuits of creditors, should be sold out by the former as theirs, and the price accounted for the latter, over and above their advances, in preference to judgment creditors, cannot be enforced in a Court of justice. *Id.*

29. Where an exception is put in at the argument in the Supreme Court suggesting that the contracts between the parties to the suit are illegal, immoral and contrary to public policy, the Court is bound to notice it, without any plea; and in such cases even no recovery can be had. *Gravier's curator v. Carraby's executor on a re-hearing*, 17 L. R. 132.

30. So where it is shown by the evidence that the contracts and agreements sued on are of a character reprobated by law, no action can arise or recovery be had. *Id.*

31. Contract for *Morus Multicaulis* trees, partly executed, is rescinded and money paid returned, on account of imposition in delivering spurious trees. *Anderson v. Dinn*, 17 L. R. 168.

32. The acts of a party from which the ratification of a contract is sought to be deduced, must evince clearly and unequivocally *his intention to ratify*. If his acts be in any manner accounted for without a ratification of the contract necessarily resulting from them, they do not amount to an approval or confirmation. *Copland v. McMickie et al.*, 17 L. R. 286.

33. A contract under a penalty to buy plaintiff's plantation for a certain price, payable in a year, but to be discharged on the vendor's obtaining a loan from Bank on mortgage of the premises, by the vendee's taking his place: *held* that as soon as the loan was obtained the purchaser became liable for the penalty on failing to take his vendor's place as debtor to the Bank. *Nettles v. Scott*, 17 L. R. 336.

34. A notary may be employed as agent of the party to give notice in writing as the second mode under the Louisiana Code, of putting the adverse party to the contract in default. *Nettles v. Scott*, 17 L. R. 336.

35. The interest stipulated on the price of a plantation, will be considered as a yearly sum for its use and occupation, when the vendee or party is in possession, independent of any damages or penalty the party may be liable for, on non-compliance with the contract of sale. *Id.*

36. The defendant who contracted under a penalty to buy the plaintiff's plantation for a certain sum, payable in a year, to be discharged on the vendor's obtaining a loan from Bank on mortgage of the premises, by the vendee's taking his place: *held*, that as soon as the loan was obtained, the purchaser became liable on his contract, &c. *Id.*

37. The article 2257 of the Louisiana Code, requiring contracts for sums exceeding \$500, to be proved by more than one witness, relates to *verbal* and not *written* obligations on contracts. *Police Jury of Iberville v. Sherburne et al.*, 17 L. R. 342.

38. When the thing sold remains in the corporeal possession of the seller, who is suffered to act as owner, to the injury of a third person, the rule that the delivery of an immoveable always accompanies the public act which transfers the property, ceases to be applicable. *Thibodeaux v. Thomasson et al.*, 17 L. R. 353.

39. The creditor who has contracted under the faith of his debtor's being the owner of property which he is in possession of at the time of the contract, ought to be allowed to seek his remedy without regard to *the date* of the pretended sale by which it is attempted to be transferred to another. *Id.*

40. The Court will not presume that parties make use in their contracts of words to which no meaning is attached by them. Some effect is to be given to every word if possible; and but rarely will the Court reject words or phrases in a contract as surplusage. *Rolland's heirs v. McCarty*, 19 L. R. 77.

41. Where the act of sale of a lot conveys the object sold without any exception or reservation, together with "the privileges, rights and pretensions which belong to it; and if the extent be greater than is mentioned, it shall be for the advantage of the purchaser," every thing and all accretions, present and future, pass thereby. *Id.*

42. Where there is no privity of contract, between the plaintiff and defendant, the latter cannot be put in delay. *Agricultural Bank of Mississippi v. Barque Jane*, 19 L. R. 1.

43. Where a contract is made for the sale of a quantity of cotton in bales, for such a price as two brokers chosen by the parties shall name, the moment the brokers agreed upon the price, the sale was complete, and no new conditions could be imposed. *Chevremont v. Fulton et al.*, 19 L. R. 248.

44. Contracts are to be decided by the law of the place where made; but there is an exception, which is, that no nation is bound to recognize or enforce contracts, which are injurious to its interests or people. *Buckner, Stanson & Co. v. Watt*, 19 L. R. 216.

45. A bond for a certain sum, with a condition that it shall be void on the delivery by the obligors of a particular note, is a contract the principal obligation of which is the payment of the sum which it acknowledges to be due, subject to a resolute condition, to wit, the surrender of the note. *Lenoir and another v. Kain and others*, 1 R. R. 233.

46. The execution of an obligation may be suspended, but the obligation itself cannot. Where an obligation has once ceased to exist, it can only be revived in the manner it was created. *Frey and another v. Hebenstreit and another*, 1 R. R. 561.

47. A party may be bound by what is contained in an act between third persons, where it is proved that he had notice of it; and as parole testimony is necessary and admissible to prove such notice, whatever took place at the time of notice may, by the same kind of evidence, be proved as part of the *res gestæ*. *Benton v. Roberts and another*, 1 R. R. 101.

48. A contract made by the syndic of the creditors of an insolvent with counsel, to pay a certain sum for professional services for the benefit of the estate, is not conclusive upon the creditors, who may oppose the allowance, and reduce the amount, if exorbitant. Such allowance should be in proportion to the number and importance of the suits prosecuted or defended, and to the other professional services rendered, and will form a charge upon the creditors. *Girard and another v. their creditors*, 1 R. R. 455.

49. The English text of article 3423 of the Civil Code, is an incorrect translation of the original French. The French text is copied *verbatim* from article 2220 of the Code-Napoleon; and means only, that no renunciation can be made, at the time of entering into a contract, of the right of pleading a prescription which may be thereafter acquired. It does not prohibit the renunciation of the benefit of time already elapsed, to prevent prescription from being accomplished, which is but an interruption of prescription such as would result from an acknowledgment of the debt. But no stipulation can be made to prevent its running anew, the moment after such interruption. *Segond v. Landry*, 1 R. R. 335.

50. One joint and several obligor cannot rescind an agreement made by both with their common creditor, and which operated a discharge, so as to compel his co-obligor, who does not consent to the rescission, to remain bound. The obligation once extinguished, can only be revived against those who consent to it. *Benton v. Roberts and another*, 1 R. R. 101.

51. A receipt to one of two obligors *in solido*, purporting to be for his part, severs the obligation, and extinguishes it as to him who has paid. *Id.*

52. Article 1988 of the Civil Code, declaring that a creditor cannot sue to annul a contract made before the time, when his debt accrued, applies to contracts apparently complete and regularly carried into effect by the debtor, and does not extend to cases where the latter has never been out of possession of the property pretended to have been sold, and where third persons have treated with him on the faith of his being the owner of the property so found in his possession. *Laville v. Hebrard and another*, 1 R. R. 435.

53. An act of express ratification to be valid, must mention: *first*, the substance of the obligation; *second*, the motive; *third*, the intention to repair the vice, or vices which exist. If there be several vices, mention of one only will not repair the others. *Walden v. Peters and another*, 1 R. R. 457. *Same v. Strong*, 1 R. R. 459.

54. Where in a suit against a land-holder for his proportion of the expense of work executed by the plaintiffs, under a contract with commissioners, appointed by an ordinance of the Police Jury, the plaintiffs rely on an assumpsit of the defendant, proof of the appointment of the commissioners will not be required. *Mackin and others v. Rowley*, 1 R. R. 82.

55. Where by agreement between the parties, a judgment has been confessed on an express stipulation of certain conditions, as to the time and manner of its execution, the conditions will be obligatory. *Manadue v. Franklin and another*, 1 R. R. 122.

56. Articles 2258, 2259 of the Civil Code, relate exclusively to written obligations which have been either lost or destroyed. They are in derogation of the general principles of evidence, and will not be extended to cases not clearly within their purview. *Slocomb and others v. Watkins*, 1 R. R. 214.

57. Defendants purchased of plaintiff certain shares of the stock of a Bank just incorporated, for which they bound themselves to pay a *premium* of so much a share, provided the institution should go into operation by a time fixed in the contract. The vendor finding that the Bank could not go into operation unless an arrangement were made which required a reduction of the number of shares allotted to each subscriber, consented to such reduction, in consequence of which he was unable to deliver the whole number of shares he had contracted to furnish. *Held*, that as the reduction was brought about by his own act, he was only entitled to recover the *premium* agreed upon, for the number of shares he was enabled to deliver. *Seghers v. New-Orleans Improvement and Banking Co.*, 1 R. R. 239.

58. Defendant offered plaintiff's agent certain notes in the settlement of a debt due to his principal, and to guarantee the payment of any portion which could not be collected after suit, on condition that the latter would advance the expenses and assume the responsibility of their collection, and in the mean time suspend any proceedings against him. Plaintiff refused to assume the expense and

responsibility of collecting the notes, but retained them as collateral security, and sued for the original debt. *Held*, that so long as he retained the notes, his right of action would be suspended. *Dixon v. Ford and another*, 1 R. R. 253.

59. A witness may be admitted to prove that the date of a bond offered in evidence was a clerical error, and to establish the real time of the execution. *Belot v. Donnavan*, 1 R. R. 257.

60. Where two persons have signed a joint and several bond as sureties, either may be proceeded against without the other. *Id.*

61. A contract to sell a right to locate a certain number of acres, "on any unappropriated lands" of the United States in a particular State, is not complied with by the offer of a right to locate such number of acres "on any public lands in that State subject to entry." The contract contemplated the right of locating upon any part of the public domain within the State, while the offer restricted it to such portion as had been once offered at public sale. *Rightors and others v. Phelps*, 1 R. R. 325.

62. Parole evidence is inadmissible to prove the intention of the parties at the time of entering into a written contract. But it may be received to prove a subsequent agreement, to grant an authority not conceded in the original contract. *Ross v. O'Nail*, 1 R. R. 358.

63. No proof will be required of the signatures to a bail bond, taken and attested officially by a justice of the peace. *The State v. Boisseau and others*, 1 R. R. 388.

64. Where a bond has been executed by filling up a printed form, interlineations made in consequence of want of space to contain all the necessary writing, will be considered as sufficiently accounted for. *Id.*

65. The demand required to be made of an administrator, curator or testamentary executor, before commencing suit against a succession, is in the nature of an amicable demand, and need not be proved, unless specially denied. *Police Jury of St. Helena v. Fluker, administrator*, 1 R. R. 389.

66. Where the demand in the petition exceeds five hundred dollars, but the amount in dispute has been reduced below that sum by pleas of prescription and *res judicata*, the testimony of a single witness, without corroborating circumstances, will suffice to establish the plaintiff's claim for such reduced amount. *Id.*

67. In an action on a contract, the original of which has been lost, it will be sufficient to allege the loss, and to state its contents, in the petition; proof of the loss, need not be offered previous to the trial. *Townsend and another v. Caldwell*, 1 R. R. 433.

68. Art. 3499 of the Civil Code, which prescribes the action of workmen and laborers for their wages after one year, does not apply to an action by workmen for specific work, done under a written contract. *Id.*

69. Where the record shows that all the persons who entered

into the original contract with the defendants, are plaintiffs, it will be no objection, that others, who became subsequently interested in the contract, without the privity of the defendants, are not made parties to the suit. *McCord and others v. West Feliciana Rail Road Company*, 1 R. R. 519.

70. The neglect or refusal by a Bank to pay its notes in specie, is only a *passive* violation of its contracts; and the mere announcement of its intention not to pay notes in specie, by a resolution suspending specie payments, cannot, consequently, be considered an *active* violation of its contracts. *Bartlett v. New-Orleans Canal and Banking Company*, 1 R. R. 543.

71. The grant by legislature of a privilege to raise money by lottery, without any limit as to time, may be restricted by a subsequent law, before any rights have been acquired under the first. The permission to draw lottery is not, *per se*, a contract; and until it has been accepted and rights have been acquired under it, is entirely within the control of the Legislature. *Davis v. Caldwell*, 2 R. R. 271.

72. A stipulation that a certain sum shall be paid to a third person towards the extinguishment of a debt due to him from one of the parties to the contract, is not a *stipulation pour autrui*. It is for the exclusive benefit of the stipulating party. *Tiernan v. Martin*, 2 R. R. 522.

73. A subscription by a municipal corporation, to the stock of an incorporated company, though unauthorized by the charter of the Municipality, will be binding on it if subsequently sanctioned by the Legislature. *First Municipality of New-Orleans v. Orleans Theatre Co.*, 2 R. R. 209.

74. The Court will not lend its aid to settle disputes relative to contracts or transactions reprobated and forbidden by law. It will note, *ex-officio*, the illegality of the subject. *Davis v. Caldwell*, 2 R. R. 271.

75. The partial execution of an obligation against which an action of nullity, or rescission would lie, subsequently to the period at which it might have been validly confirmed or revoked, if voluntary, is a tacit confirmation. C. C. 2252. *Bonneau v. Poydras*, 2 R. R. 1.

76. One who is notified that a contract has been made for him, subject to his ratification, by another pretending to have authority for that purpose, will be presumed to have ratified it, unless he repudiates it immediately after being notified thereof. *Id.*

77. A contract will be deemed to have been made in fraud of creditors, where the obligee knew that the obligor was in insolvent circumstances, and the contract gives to the obligee, if a creditor, any advantage over the other creditors of the obligor. It will not be necessary to establish positive knowledge in the obligee of such insolvency; proof of circumstances tending to produce a

strong impression that he was aware of it, will suffice. *De Blanc v. Martin*, 2 R. R. 38.

78. A contract, made in good faith, cannot be annulled, though it prove injurious to creditors; nor can a contract, though made in bad faith, be rescinded, unless it operate to their injury. C. C. 1973. *Taylor v. Whittemore*, 2 R. R. 99.

79. By the laws of this State, a contract tainted with usury is voidable only as to the usurious interest, and valid as to the principal. *Walden v. City Bank of New-Orleans*, 2 R. R. 166.

80. An offer of restitution must be proved, to maintain an action of rescission. *Id.*

81. A stockholder in a company cannot avail himself of the misbehavior of the corporation, in not investing the capital stock according to the charter, to avoid his own contract. *First Municipality of New-Orleans v. Orleans Theatre Co.*, 2 R. R. 209.

82. To recover damages for illegal attachment, or for the hire of slaves seized by attachment, it is not necessary to put the attaching party in default. But where an attachment has been levied on slaves, and they have, with the consent of the debtor, remained in the hands of the plaintiff in attachment, to enable the former to recover their value, the latter must be put in default otherwise than by the institution of suit. *Cox v. Robinson*, 2 R. R. 313.

83. Putting the defendant *in morâ*, is a condition precedent to recovery of damages for a passive violation of a contract. Such damages are only due after the debtor has been put in default, and the default must be alleged and proved; nor can evidence be received to prove a demand, where it has not been alleged in the petition. *McMaster v. Brander*, 2 R. R. 498.

84. The master of a ship which arrived at New Orleans, during an epidemic yellow fever, bound to Natchez, contracted, for a fixed price, with owners of a steamer, to tow his vessel to the latter place, and to start from New Orleans on the evening of the succeeding day. The steamer could not be got ready sooner. Influenced by the apprehension of his passengers for their safety, the master notified the owners of the steamer in the evening of the day on which the contract was made, that he should be compelled to leave in tow of an other boat which could start at once. In an action on the contract: *held*, that from the peculiar circumstances of the case plaintiffs were entitled to recover only the amount of damage actually sustained, and not the whole amount of profit which they might have derived from the performance of the contract. *Glover v. McAllister*, 2. R. R. 161.

85. Where an undertaker has not complied with the terms of his contract for the erection of a house, but his employer receives and uses it, the latter will be bound to pay for the value of the work. *Clark v. Kemper*, 3 R. R. 10.

86. In an action on a joint contract, all the obligors must be made defendants, though one of them may have performed his

part, or may be domiciliated in a parish beyond the jurisdiction of the Court, parties contracting joint obligations being considered to waive the personal privilege of being sued before the Court having jurisdiction over the place of their domicile; and the judgment must be against each defendant, separately, for his proportion. *Thompson v. Chretien*, 3 R. R. 26.

87. Courts of Justice will not lend their aid to either party, to enforce a contract entered into for purposes reprobated by law. *Puckett v. Clarke*, 3 R. R. 81. *Eastman v. Beiller*, 3 R. R. 220.

88. Articles 2080, 2082 of the Civil Code require that all the obligors in a joint contract shall be sued together, including those who may have performed their part, in order that the latter may recover back what they have paid, in case it should be determined they were not bound. The judgment for costs must be *in solido*, against those who have not performed their part. *Drew v. Atchison*, 3 R. R. 140.

89. In the interpretation of contracts, the intention of the parties is to be ascertained and effect given to it, and to all the clauses of the contract. No construction is to be given which will render important expressions useless. The intention must be determined by the words of the contract, if possible; but where the intention is doubtful, the interest of the parties or other contracts, may be referred to. Where a clause is susceptible of two interpretations, it must be understood in that sense in which it will have some effect. So, the manner in which it has been executed, or acted under, by both parties, or by one with the express or implied assent of the other, also furnishes a rule of interpretation. Finally, in doubtful cases, the construction must be against the party who has contracted the obligation. *Wells v. Compton*, 3 R. R. 171.

90. Where the intention of the parties to a contract is doubtful, under article 1951 of the Civil Code, the Court will inquire into the whole conduct of the parties in relation thereto. *Id.*

91. In all actions of rescission, the party seeking relief must have offered to restore his adversary, to the situation he was in before the contract. *Tippett v. Jett*, 3 R. R. 313.

92. Where a person in New Orleans orders, by letter, goods to be shipped to him from New York, offering to pay for them at a certain period after shipment, the contract will be governed by the laws of the latter place, where the final assent necessary to the completion of the contract was given, and the order received and executed. *Shaw v. Oakey*, 3 R. R. 361.

93. The putting a debtor in default, is a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, but may be taken advantage of at any time. C. C, 1906. *Hodge v. Moore*, 3 R. R. 400.

94. A debt as between the debtor and creditor, is indivisible, without the consent of both. A debtor cannot be compelled to pay his debt to a number of transferees, among whom it may please

the creditor to divide it. C. C. 2107, 2149. The provisions of the twelfth chapter of the seventh title, of the third book of the Civil Code, articles 2612, 2024, must be understood as applying only to entire debts, rights or claims. *Cantrelle v. Le Goaster*, 3 R. R. 432.

95. A counter-letter, or some thing equivalent thereto, is the only proof admissible to establish simulation, not fraudulent, between the parties to a contract, or their representatives. Parole evidence is inadmissible. *Liautaud v. Baptiste*, 3 R. R. 432.

96. A legatee representing an ancestor, and claiming under him, can have no other means of avoiding a contract than such as the ancestor possessed. *Id.*

CO-PROPRIETORS.

1. According to the Civil Code of 1808, when property was acquired jointly by inheritance, purchase or otherwise, and could be partaken, it might be partitioned by cant or licitation to the highest bidder among the co-proprietors. *Porter v. Depeyster*, 18 L. R. 351.

2. When the co-proprietors were of full age, the licitation could only take place amicably and by private sale; but if they disagreed, were minors, interdicted or absent, the property could only be sold at public sale, after the usual advertisement, but any of the co-proprietors could purchase. This operated a mode of partition. *Id.*

3. So where joint property is sold after the death of one of the co-proprietors and purchased by the survivor, who is also the executor causing the sale: *held*, that it was the effect of the *commune dividendo*, and the executor was not deprived of his right in common with the other co-proprietors to purchase. *Id.*

CORPORATION.

1. To enforce the forfeiture of the charter of a corporation, proceedings must be instituted to that effect by the State; and unless the power of instituting such proceedings be expressly delegated by law, *the State alone possesses it*; and having the power, may forbear to exercise it and waive the forfeiture, *Atchafalaya Bank v. Dawson*, 13 L. R. 497.

2. A charter granted by the State, does not become absolutely null, by the inexecution of the condition annexed to it. A cause of forfeiture cannot be taken advantage of, or enforced against a Corporation incidentally, or in any other mode, than by a direct proceeding *instituted by the government*; because it may waive a broken condition of a contract or charter, as well as an individual. *Id.*

3. The clause in the Bank charters of this State, which declares that in case of a suspension of specie payments for more "than ninety days, the charter shall be *ipso facto* forfeited and void," gives to the State the right to claim the forfeiture, in an action instituted for that purpose; and although the Bank may have forfeited its corporate life, it continued to exist as so long as the State did not claim the forfeiture. *Atchafalaya Bank v. Dawson*, 13 L. R. 497.

4. Martin J.—The Legislature possessed the power to remit any forfeiture that resulted to the Bank charters, by suspension of specie payments; and the exercise of that power in the act for the "relief of the Banks", approved March 14, 1839, relieves them from all penalties incurred by the non-payment of specie. *Id.*

5. Where a Corporation is a mere creature of legislative will, established for the general good, endowed by the State alone, the Legislature may, at pleasure, modify the act of incorporation or law by which it was created. The trustees of such a Corporation are the mere mandatories of the state. *Montpelier Academy trustees v. George et al.*, 14 L. R. 395.

6. But where certain individuals are incorporated, and constituted a body politic, as trustees of an academy, with power to acquire property, and receive donations from individuals and the State, on condition to establish an academy and educate pupils, and also receive a yearly grant from the State, on condition to teach a certain number of indigent children; and where such Corporation has complied with conditions: *held*, that the corporators acquired vested rights in the nature of a contract which cannot be taken from them by the State, without a manifest violation of the constitution of the United States, Art. 1. Section 10. *Id.*

7. A Corporation or Bank, in which the stock is entirely owned by an other State, and created by its laws, may, nevertheless, be sued in the Courts of this State. *Martin, Pleasants & Co. v. Branch Bank of Alabama*, 14 L. R. 415.

8. An attachment lies against the property of a Corporation, incorporated by the laws of another State. *Id.*

9. Where the signatures of the proper officers of a Corporation are proved, and the seal is affixed, the Court are to presume the officers did not transcend their authority, and that the seal was affixed according to the requirements of the charter. *Adams v. his creditors*, 14 L. R. 454.

10. Courts may, however, when a deed is signed by the officers and sealed with the seal of the Corporation, look beyond the seal, but it is *prima facie* evidence that it was so affixed by proper authority. The contrary must be shown by the adverse party. *Id.*

CORPORATION OF NEW ORLEANS.

1. The property owned by the Corporation of New Orleans,

at the time of its division into Municipalities, belongs to the Municipality in which it is situated; but the proceeds of all sales, claims for money, rights and credits, due to it at that time, can only be claimed and sued for by the Mayor and Commissioners of the sinking fund. *Municipality No. 1 v. Barnett*, 13 L. R. 344.

2. So where certain lots, situated in the first Municipality, were sold by the Corporation to the defendant, before the division of the City, but the terms of the sale not being fully complied with, or payment made, this Municipality cannot maintain an action for the rescission of the sale and get back the property. This right can only be exercised by the Mayor and Commissioners. *Id.*

3. The town of Milneburg, on the margin of lake Pontchartrain, is considered to lie within the incorporated limits of the City of New Orleans, and subject to the operation of the city ordinances and police regulations. *Milne v. Mayor et al.*, 13 L. R. 68.

4. Where the act of incorporation does not expressly include the inhabitants of a certain place within the city limits, yet if they considered themselves residents within them, and enjoyed the rights of the other corporators for a long time, this will be adopted as a practical interpretation of the law as embracing and subjecting them to the police regulations. *Id.*

5. The Commissioners appointed under the act of 1832, for opening and widening streets in New Orleans, are made the sole judges of the cases in which improvements are of so general a nature as to require payment of the expenses by the whole community, or only by the owners of property in the immediate vicinity, who are specially benefited by the improvement. *Blanchet v. Municipality No. 2*, 13 L. R. 322.

6. The Courts are open to any abuses of the Commissioners, but the party aggrieved must administer proof of the injury he complains of. *Id.*

7. The sale of the part of the open space or *quai*, in front of Old Levee street, was sold as *public* property, and has been lawfully alienated by the assent of the sovereign authority; for the disposition of the proceeds of the sale, in being made part of the sinking fund of the City, by an act of the Legislature, is equivalent to an original authority on the part of the State to make the alienation. *Mayor et al. v. Hopkins et al.*, 13 L. R. 326.

8. The public space or *quai*, is, by the plan of the city, appropriated to the use of the public, and having been ever occupied as such, is a public place, *hors de commerce*, and cannot be claimed by an individual in a civil action. *Id.*

9. The destination of this space as a *public place*, was made by the sovereign power, and the right to alienate or to make a change in it, whenever the public interest requires it to be done, is vested in the sovereign power, and to this the rights of front proprietors are subordinate. *Id.*

10. Front proprietors of lots cannot prevent the sovereign au-

thority of the State from alienating the vacant space in their front, designated as a public place, or *quai*, when the public interest requires it. Their rights are subordinate. *Mayor et al. v. Leverich et al.*, 2 cases, 13 L. R. 332.

11. The sovereign authority in a State, can authorize the alienation of a public *place*, destined for public use, when from the nature of its destination, the public interest requires it. *Id.*

12. The Mayor of New-Orleans, who is intrusted with the execution of the laws for the benefit of all the corporators, has the capacity to sue and prohibit by suit, the passage or executoin, by any of the municipal council, ordinances or resolutions, contrary to the charter and to test their legality by suit. *Genois, Mayor &c. v. Lockett et al.*, 13 L. R. 545.

13. So, the Mayor may maintain an action to prohibit and restrain the officers of any of the Municipalities, from doing any acts contrary to the laws of the State, and in violation of the city charter. *Id.*

CORPORATIONS.

1. The Banks retain the capacity to sue and stand in judgment, notwithstanding the suspension of specie payments by them for a longer period than that allowed by their charters. *Union Bank v. Macdonald*, 15 L. R. 25.

2. The third section of the act of the Legislature, approved March 6, 1834, which authorizes the Corporation of New-Orleans, to cause to be sold, for the account of whom it may concern, any objects or property whatever which encumber the levee, streets &c., and are suffered to remain in these places for a longer time than the ordinances permit, is *unconstitutional*, and the owner may recover the value of the objects thus sold, from the Corporation. *Rost v. Mayor et al.*, 15 L. R. 129.

3. The liability of Corporations is the same as natural persons, for the acts and neglect of their agents when acting within the scope of their employment. *Ware, f. m. c. v. Barataria and Lafourche Canal Co.*, 15 L. R. 169.

4. In a suit for a liquidation among stockholders of an incorporated company, it cannot be legally tried, nor judgment rendered, unless all the parties have been cited, answered, or judgments by default taken against them. *Reynolds, Byrne & Co. v. Feliciana Steam-boat Company*, 17 L. R. 397.

5. Stockholders in an incorporated company cannot be rendered liable *in solido*. The corporators are only liable in proportion to the stock each one holds. *Id.*

6. The fact that the stockholders are made liable for losses, beyond the amount of the capital stock, does not make each stockholder liable *in solido*, but only proportionally according to the number of shares held by him. *Id.*

7. The town of Fochabers in Scotland, is a burgh of Barony under the Ducal family of the Duke of Richmond, incorporated as such; has a right to enjoy the privileges allowed them as a corporation; and as such, has capacity to receive by donation *intervivos* or *mortis causâ*, which right it can exercise by trustees. *Duke of Richmond v. Milde's, executor et al.*, 17 L. R. 312.

8. A Corporation cannot offer its stockholders as witnesses, though the opposite party may; but when once admitted they may be cross-examined, and give evidence in favor as well as against their interests, on the points to which they were called to testify. *Hart v. The New-Orleans and Carrollton Rail Road Co.*, 1 R. R. 178.

9. In a suit against a Corporation the individual stockholders are not cited, but only those agents or officers whom the law designates as managers of its affairs; such stockholders do not occupy the position of actual defendants, who must be interrogated on facts and articles but may be summoned by the opposite party as witnesses to testify against their interest. *Id.*

10. The books of a Corporation are evidence of the acts and proceedings of the body, and, with respects to the corporators, are public. They are common evidence, and each individual having a legal interest in them, has a right to inspect and to use them as evidence of his rights. But a *mandamus* will not be issued to compel the keeper of such books to allow an inspection, or the taking of copies, unless a clear right be shown, and some just or useful purpose is to be effected. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

11. A subscription by a Municipal Corporation, to the stock of an incorporated company, though unauthorized by the charter of the Municipality, will be binding on it if subsequently sanctioned by the Legislature. *Municipality No. 1 of New-Orleans v. Orleans Theatre Co.*, 2. R. R. 209.

12. A stockholder in a company cannot avail himself of the misbehavior of the Corporation, in not investing its capital stock according to the charter, to avoid his own contract. *Id.*

13. An act of incorporation may be forfeited by misuse or abuse. It is a tacit condition of such a grant, that the grantees shall act up to the end or design for which they were incorporated; and where they do not, the rights and privileges granted may be withdrawn. But the misuse or abuse must be first judicially ascertained. *State v. New-Orleans Gas Light and Banking Co.*, 2 R. R. 529.

14. Banks, insurance, canal, bridge, and turnpike companies, the stock of which is owned by private individuals, are essentially private Corporations. *Id.*

15. The existing law of the State forms as much a part of the contract in every act of incorporation, so far as it is applicable, as it does of every contract between individuals. *Id.*

16. The tenth title of the first book of the Civil Code relative to Corporations, applies to every charter granted since its adoption, unless there be something in the latter repealing or suspending its provisions. *State v. New-Orleans Gas Light and Banking & Co.*, 2 R. R. 529.

17. One who signs an agreement to take stock in an incorporated company thereby promises to pay the full amount of every share thus subscribed for; and an action will lie to recover it, either for the purpose of carrying on the business of the company, or of paying its debts. And where the stockholders refuse or neglect to elect directors to manage its affairs, or elect those who will not call in the stock to pay its debts, any creditor will have an action to compel such stockholders to pay, each of whom will be responsible for the amount subscribed by him, if so much be necessary to pay the debts. The stockholders will not be allowed to throw the loss upon the creditors, either by refusing to pay for their stock, or by forfeiting it, or by dissolving the Corporation by non-user or otherwise. *Cucullu v. Union Insurance Co.*, 2. R. R. 573.

COSTS.

1. According to the Civil Code of 1808, Costs of suit against an insolvent debtor previous to his failure, and taxed Costs of every kind were entitled to be paid by privilege under the denomination of law charges. *Rousseau v. His creditors*, 17 L. R. 206.

2. Under the Louisiana Code, *law charges* are defined to be costs incurred in Court in the prosecution of a suit, to be paid by the party cast; and the creditor is entitled to a privilege when the costs he claims are *taxed costs*; whether in a suit previously to or in the *concurso*, against the insolvent debtor's estate. *Id.*

3. Where the plaintiffs take nothing by their suit, the defendants should be allowed all their Costs. *Orleans Navigation Company v. Municipality No. 2*, 17 L. R. 269.

4. The jury tax in some of the parishes, required to be paid by the party cast, or who discontinues his suit, does not make part of the legal costs, to be taxed in the suit and paid before another suit can be commenced. *Whittemore & Young v. Leake & Howell*, 17 L. R. 463.

5. The payment of the ordinary taxed Costs of the clerk's and sheriff's fees is a sufficient compliance with the article 492 of the Code of Practice, to authorize a party non-suited, or who discontinues, to begin. *Id.*

6. Where a judgment has been rendered in favor of the plaintiff, the whole judgment, including the costs, is his property. He is supposed to have advanced, or to be liable for the Costs; and the sheriff has no right, in violation of the orders of the plaintiff, or his

attorney, to sell the property seized, in order to secure their payment. Such a sale will be void. *Williams v. Gallien*, 1 R. R. 94.

7. Where in a suit by attachment, an intervenor establishes his claim to the property seized, the costs must be borne by the party cast. But where in such a case, by an agreement between the parties, including the intervenor, the property, being of a perishable nature, is sold, and the proceeds deposited to await the decision, the sheriff will be entitled to retain out of the proceeds, the expenses of the sale, and of the safe keeping of the property from the date of such agreement. The agreement was for the benefit of all; and the sheriff was their agent to carry it into effect. The intervenor must look to the plaintiff for reimbursement. *Graham v. Swayne*, 1 R. R. 186.

8. Where the amount applicable to the payment of the law charges privileged against the estate of an insolvent, is insufficient to pay the whole, they must be paid *pro rata*. *Garretson v. His creditors*, 1 R. R. 445.

9. Costs of protest of a Bank note may be recovered, though a notarial demand was unnecessary to entitle plaintiff to interest. The object of the protest is not only to secure interest, but to procure permanent and authentic evidence of a demand at the place of payment. And where different notes of the same institution, held by the same individual, are separately protested, he will be entitled to recover the costs of protesting each note, having to make a separate demand on each, the notary might well refuse to include them all in a single protest. *Trezevant and others v. Bank of Tennessee*, 1 R. R. 465.

10. Non-payment of the Costs of a suit, for the same cause of action, previously discontinued, is not sufficient ground for a dismissal; but will justify the defendant in delaying to answer until paid. The exception is a dilatory one. It is not necessary that such costs should have been paid in money; it will be sufficient, if the officers, to whom they were due, acknowledge that they have been satisfied, as the defendant will be thereby discharged from any liability for them. *Jordan v. Black*, 1 R. R. 575.

COURTS.

1. The Supreme Court disclaims a general superintending control over the inferior jurisdictions; but it will exercise every power incident to its appellate jurisdiction, as defined by the constitution, and in the forms prescribed and established by the Legislature. *State of Louisiana v. Judge Bermudez*, 14 L. R. 478.

2. The authority of the Legislature must, however, be considered in relation to the constitution, which allows this Court appellate ju-

jurisdiction only, and in matters which have a tendency to aid this jurisdiction. *State of Louisiana v. Judge Bermudez*, 14 L. R. 478.

3. This Court cannot direct inferior Courts what judgments they are to render, but in cases in which it is their duty to *proceed* and take cognizance, they may be so directed, and their judgments be appealed from as in other cases. *Id.*

4. It is only in relation to Courts acting judicially, and in cases in which an appeal might be prosecuted to this Court after final judgment, that it will issue writs of *procedendo* or *mandamus*. *Id.*

5. So, on the refusal of the judge of the Probate Court, on an application of the tutrix to appoint an under tutor to her minor children, and order a family meeting, with a view to relieve her property from a general mortgage, and give a special one, a peremptory *mandamus* will be awarded requiring him to proceed. *Id.*

6. The nullity of a probate sale cannot be sought in a direct action in the District Court. The order of sale by the Probate Court is held to be a judgment which protects purchasers under it. *Graham's heirs v. Gibson*, 14 L. R. 146.

7. Suit was instituted for the whole amount of a policy of insurance, which the defendants had settled and paid, but the suit was instituted with the view to try a feigned case to see if the defendants were not entitled to retain nine hundred dollars, for brick taken from the old building to reconstruct the new houses: *held*, that Courts of justice will not entertain or act on a feigned case or suit, even with the consent of parties. *Kohn et al. v. Louisiana Insurance Company*, 15 L. R. 86.

8. Courts sit to administer justice in actual cases, and will not act on, or entertain feigned suits or cases, even with the consent of parties. *Id.*

9. The rule of the Commercial Court authorising either party, when the cause is at issue, to set it for trial on giving the opposite party three days notice, is not contrary to art. 463 of the Code of Practice, requiring each suit to be called in its term, and a day for trial. *Green v. Dakin & Dakin*, 15 L. R. 152.

10. No evidence can be received in the Supreme Court, that a judgment, by consent, was entered up differently from the consent and agreement between the parties. *Brand v. Jones*, 15 L. R. 449.

11. The Probate Court can inquire into the validity of sales and titles to immovable property, whenever the question arises collaterally in matters within its jurisdiction. *Badon's heirs v. Foucher et al.: H. Badon's, heirs, intervenors*, 15 L. R. 455.

12. In a contest about the right and title to property, between two sets of heirs claiming under different ancestors, and which is not a necessary incident to a partition, the Probate Court is without jurisdiction. *Id.*

13. The Courts of this State will enforce an equitable right arising in another State, when the remedy is sought here. *Jackson v. Ticman et al.*, 15 L. R. 485.

14. The assignment of a part of a debt will be enforced in the Courts of Chancery, and by the Courts of this State, where the obligation resulting from the assignment of a part of the debt may be implied from the custom of trade, or the course of business between the parties. *Jackson v. Tiernan et al.*, 15 L. R. 485.

15. The Probate Court is without jurisdiction or authority to compel property of an estate, which has been alienated by a co-heir and in the possession of a third person, to be brought into partition among all the heirs. It cannot inquire into the validity of title to real property, which is held by a party who is not an heir. *Kemp v. Kemp et al.*, 15 L. R. 517.

16. It is necessary that the Parish Judge should designate in all his proceedings, the capacity in which he acts; and the proceedings of the Probate Court must be conducted and kept distinct from those of the Parish Court. *Segur v. Pellerin*, 16 L. R. 63.

17. In Courts of general jurisdiction, the testimony of witnesses must be taken down by the clerk, if either party intends to appeal. *Tompkins et ux v. Benjamin, tutor, &c.*, 16 L. R. 197.

18. In the Courts of Probate, the Judge is required by the 1042 article of the Code of Practice, to take down the testimony of witnesses in writing, and annex it to the record, together with a list of the documents produced by the parties, that they may be read on the appeal. *Id.*

19. So, where the Judge of probates failed or neglected to take down the testimony of the witnesses on the trial, and the record is brought up without it, the cause will be remanded for a new trial. *Id.*

20. Where the Judge of probates fails or neglects to take down the testimony of the witnesses in writing, according to the provisions of the 1042 article of the Code of Practice, it will alone suffice to remand the case for a new trial. *Graham's heirs v. Graham's administrator*, 16 L. R. 201.

21. The Court of Probates, in ordering the sale of the property of a succession, necessarily possesses the power to erase all mortgages existing on it, and to give a clear title to the purchaser. *Williams v. Bank of Louisiana*, 17 L. R. 378.

22. Probate Courts are authorised to exercise all such powers as may be necessary to enforce their jurisdiction; and to take cognizance of any matter arising from the consequence of the exercise of such jurisdiction. *Id.*

23. The evidence of the Parish Judge is good in the Court of Probates as far as it goes to show that the defendants assented to the sale, and agreed to look to the proceeds of certain property for their claim. *Id.*

24. The City Court of New-Orleans is without jurisdiction in a proceeding where interrogatories are propounded to garnishees, under the 13th section of the act of 1839, amending the Code of Practice, having for its object to set aside a sale of immoveable

property, as simulated and made in fraud of creditors. This Court cannot take cognizance of civil cases of real nature. *Samory v. Hébrard et al.*, 17 L. R. 555.

25. The City Court has express authority and power to try suits on notes or obligations given for immoveable property and slaves; and when a rescission of the sale is claimed in the defence. *Id.*

26. Judicial tribunals are fully empowered to adopt such conservatory measures, as may be necessary to prevent one in whose possession property may be, from removing it out of their jurisdiction, and thereby defeating the real owner in the prosecution of his rights. *Jordan v. Black*, 1 R. R. 575.

27. On an application for an injunction from the District Court in the absence of the Judge, the petition must be addressed to the Judge of that Court and not to the Parish Judge, though the latter be applied to, under the act of 1835, to grant it. *Standbrough v. Scott, sheriff and another*, 1 R. R. 43. *Wadsworth v. Harris and another*, 1 R. R. 96.

28. Courts of ordinary jurisdiction, before which an action of revendication is brought, must of necessity pronounce on the validity of a will, under which the property sued for is held, either when the plaintiff attacks it, or the defendant sets it up as his title. *Rachal, tutor and another v. Rachal and husband*, 1 R. R. 115.

29. An action for a final settlement of the partnership affairs, against a surviving partner and the curator of the estate of a deceased partner, in which the petition sets forth acts of mismanagement and fraud, is not a claim for a sum of money in the meaning of article 924 of the Code of Practice, and as such exclusively within the jurisdiction of the Court of Probates. Such an action is properly brought before a Court of ordinary jurisdiction, in which a jury, if called for, may pronounce on the question of fraud. *Gallier v. Walsh and another*, 1 R. R. 226.

30. Where one of two obligors on a joint note who must be sued together, has died, the action must be brought before a Court of ordinary jurisdiction. *Id.*

31. Where property in the hands of a judicial sequestrator, has been seized under process from another Court than that which issued the sequestration, the former tribunal may pronounce upon the validity of the seizure, though it have no power to order a release of the sequestration. *Bank of Alabama v. Hozey*, 2 R. R. 150.

32. An action for the recovery of goods claimed by plaintiff as his property, which had been surrendered by an insolvent, against one who holds them as the syndic of the creditors of the insolvent, must be brought before the Court in which the proceedings in insolvency are pending, and must be tried contradictorily with the creditors. Otherwise, were defendant sued in his private capacity for damages for unlawfully taking possession of the property of

the plaintiff; such an action may be brought before any Court of competent jurisdiction. *Clossman v. Barbancey*, 2 R. R. 346.

33. The answer to a rule to show cause taken against the Judge of an inferior Court, must be in writing, and filed with the clerk of the Supreme Court. No answer in person or oral discussion will be listened to, except from the parties interested, or their counsel. *State v. Judge of Probates of New-Orleans*, 2 R. R. 418.

34. Under the act of 10th March, 1838, section 4, the presiding Judge of the City Court of New-Orleans has, within the city, exclusively of Justices of the Peace or of the Associate Justices of that Court, original jurisdiction of all actions, for whatever amount, by landlords against their tenants, for the possession of real property. *Kennedy v. Downcy*, 2 R. R. 284.

35. Courts of Probate have exclusive jurisdiction of claims for money against succession, administered by curators, &c.; and all suits for money, pending before the ordinary tribunals, against one who dies leaving a vacant succession, must be transferred to the Court of Probates of the place where his succession is opened. *Succession of Ludewig*, 3 R. R. 92.

36. A Court of Probate is competent to determine a question of title where it arises collaterally, and its examination becomes necessary to enable it to arrive at a correct conclusion on matters within its jurisdiction. As where, in an action against a curator, for the amount of certain notes executed by the deceased, title to the notes is set up by a third party. In such a case, the Court of Probates will decide who is the real creditor of the succession. *Succession of Goodrich*, 3 R. R. 100.

37. In all cases concerning minors, the Judge referred to is the Judge of the Parish within whose jurisdiction the minors reside, if residents of the State. Act 18 March 1809, sec. 8. *Succession of Winn*, 3 R. R. 303.

38. The appointment of a tutor or curator to a minor, belongs to the Probate Judge of the domicil or usual place of residence of the father or mother of such minor, if either be alive. C. P. 944. *Id.*

39. An overseer, though entitled to a privilege on the crop for the payment of his wages, cannot maintain an action against his employer in the Parish in which the plantation is situated, where the domicil of the latter is in a different Parish. The privilege granted by law to overseers is, like all others, an accessory to the principal obligation, and must follow it. *Hollander v. Nicholas*, 3 R. R. 7.

40. Article 996 of the Code of Practice, which authorizes actions for debts due from a succession to be brought before the ordinary tribunals, where the heirs, though all or some of them be minors, are in possession of the estate, should, perhaps, be confined either to heirs absolute, or to beneficiary heirs in possession of a succession after it has been fully administered. But where a succession

appears to have had but few debts, and to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years, an action to recover a debt due by it, may be brought before the Courts of ordinary jurisdiction. *Porter v. Muggah*, 3 R. R. 29.

41. The penalty imposed by the eighteenth section of the act of 7th June, 1806, on the owner or occupier of a plantation, for keeping slaves thereon, without a white or free colored person as manager or overseer, can only be recovered by civil action before an ordinary tribunal. The action must be brought before a Justice of the Peace, a Parish, or District Court, according to the number and amount of the fines claimed. *State v. Linton*, 3 R. R. 55.

42. The first section of the act of 25th March, 1831, which provides that whenever the Parish Judge of any Parish is disqualified by interest, or otherwise, to try any case in the Parish Court, that the District Court shall have jurisdiction thereof, and that the same shall be transferred by the Parish or Probate Court to the District Court, does not contemplate the transfer of all the mortuary proceedings and documents relative to any estate in which the Judge of Probates may be interested. The District Court may take cognizance of the appointment of a curator, where the Probate Judge is interested; but it is not necessary for this purpose, that the papers relative to the succession should be removed from their proper place of deposit. *Exparte Borden*, 3 R. R. 399.

43. On a rule upon an attorney, under the third section of the act of 27th March, 1823, to show cause why an information should not be filed against him, it is the duty of the Judge by whom the rule was granted, to decide as to the sufficiency of the cause shown. The act does not require that the attorney general should be notified of, or take any part in this preliminary proceeding. *State v. Judge of the First District*, 3 R. R. 416.

CREDITORS.

1. The seizing creditor is entitled to the revenues of the property whilst under seizure, from the time it was made, until the property is sold. *Randall v. Bank of Louisiana*, 17 L. R. 273.

CURATOR.

1. Where two persons, whose pretensions are about equal, claim to be appointed curator of a vacant estate, the one first applying will be preferred, unless the one opposing alleges and shows a better right. *Brugier v. Biron*, 13 L. R. 77.

2. In a suit on a curator's bond against the surety, he is only liable for the moneys which come into the hands of the curator after signing the bond; and for the debts which are unpaid, from a failure to pay over the funds during that time. *Parmele & Baker v. Brashear*, 16 L. R. 72.

3. The condition of a curator's bond being that he will faithfully administer and perform the duties of his office, a failure to pay over money when ordered, is a breach of the condition, and the creditor has his remedy on the bond against the surety. *Id.*

CURATORS.

1. Previous to the promulgation of the Louisiana Code and Code of Practice, the appointment of a *curator ad hoc* to an absentee was not authorised by law. *State of Louisiana v. Judge of the Parish Court*, 15 L. R. 81.

2. In an action of nullity, brought by the defendant therein, to annul a judgment obtained against him as a citizen of this State, by foreign creditors, who never resided or owned property in Louisiana; held, that the suit be sustained by the appointment of a *curator ad hoc* to the absentees. *Id.*

3. Where a curator of an interdicted person is shown to have been regularly appointed, and *has acted*, and been recognized by the Court of Probates in the exercise of his office, he will be presumed to have taken the necessary oath, although none is found in the record, and his acts will be deemed valid. *Ball's administratrix v. Ball et al.*, 15 L. R. 173.

4. The oath of a curator is an important formality, not to be dispensed with; but when all the other proceedings had for the alienation of minors' or insane persons' property, have been conducted with the fidelity which an oath was intended to secure, purchasers will be protected under them, even if no oath be found. *Id.*

5. A provisional seizure is insufficient to bring an absent defendant into Court; but when a *curator ad hoc* is appointed it is sufficient. *Derepas v. Shallus*, 15 L. R. 371.

6. Where the curator of a deceased plaintiff is made a party by order of Court, after the *contestatio litis*, and is represented by counsel, the case is ready to proceed to trial, without any other delay or notice. *Carlile v. Holdship*, 15 L. R. 375.

CURATORS OF ESTATES.

1. Where the curator fails to comply with his duties and pay

over money, any creditor of the estate may at once resort to his action on the curator's bond against the surety. *Bonny & Baker v. Brashear*, 19 L. R. 383.

2. So where an estate is shown to be solvent, a creditor may sue the curator or his surety, on their bond, for the whole amount of the claim, without waiting for a distribution, when there is delay, or for others creditors to come in. *Id.*

3. The fee of attorney of absent heirs is chargeable to their share of the estate and not to the estate itself. *Hisem v. Lemel's curator*, 19 L. R. 425.

4. The costs of erecting tombs over the grave of the deceased, forms no part of the funeral expenses, and the curator has no authority to expend the means of the estate for this purpose without the consent of the heir. *Id.*

5. Where the curator, in compliance with a verbal request of the deceased in his last sickness, and with the implied assent of the heir, erects tombs over the deceased and his wife, he will be allowed the sum expended, in his account against the estate. *Id.*

6. Where a claim against an estate is unliquidated, or the curator objects and refuses to approve it, the party may sue on it in the Court of Probates; but he cannot have execution immediately, as it must be paid concurrently with other creditors. *Anderson's administrator v. Birdsall's administratrix*, 19 L. R. 441.

7. Claims against estates in the course of administration, bear legal interest from the time they are due and payable although unliquidated. *Id.*

8. A surety is only liable for the acts of the curator during the continuance of his bond; and for the proper application of the funds received during that time. *Brown v. Gunning's curatrix et al.*, 19 L. R. 462.

9. The action on a curator's bond against the sureties, is not prescribed by the lapse of one year. It is an action *ex contractu*. *Id.*

CURATORSHIP.

1. The curatorship must be given to a creditor of the deceased in preference to a person who is not such but only a friend. *Kaiser v. Hoffman*, 18 L. R. 493.

2. A person to whom any house-rent is due by the deceased is a creditor, and will be preferred for the curatorship to a stranger. *Id.*

3. The party failing in his application for a curatorship through the opposition of an other or otherwise, must pay the expenses of the contestation. *Id.*

CUSTOM OF MERCHANTS.

1. It is not sufficient, in order to prove the correctness of a charge, to show it is a custom in New-Orleans among merchants, the law merchant is more extensive than the customs of a city. *Tyson v. Laidlaw*, 18 L. R. 380.

DAMAGES.

1. A judgment creditor is liable in Damages in an action for the false imprisonment of his debtor on a *ca. sa.*, if the writ issues illegally; but where no malice is shown, and the party might have been easily mistaken in taking out his writ, if considerable damages are given, the Court will grant a new trial. *Escurix v. Dasoval*, 13 L. R. 87.

2. So where the creditor, without malice shown, took out his *ca. sa.* on advice of his counsel and imprisoned his debtor for twenty days and the jury gave three thousand dollars in damages for false imprisonment, the Court ordered a new trial, and said, "had there been a plea of prescription on the part of the defendant, it would have been noticed; and without expressing an opinion as to its effect, suggest that it be filed before the next trial" *Id.*

3. In commutative contracts it is an indispensable pre-requisite for the party claiming *damages for non-performance*, to show that he has performed his part of the contract, and that he has put the adverse party in default. *Vance v. Tourné & Beckwith*, 13 L. R. 225.

4. In an action for damages by the vendee for a breach of the contract on the part of the vendor, in failing to deliver the article, *its price or value* at the time of the breach is the measure of damages. *Shepherd et al., v. Hampton*. 3 *Wheaton* 200. *Id.*

5. In cases where it is difficult to assess the damages sustained by the party complaining, those given by the jury, even *when high* will be sanctioned, rather than expose the parties to the expense and vexation of further litigation. *Loney v. High*, 13 L. R. 271.

6. So if a party, in building a wall or house contiguous to his neighbor, by which he has demolished his building and re-builds his walls, he is bound to exercise due care and attention, and for any neglect, he is liable to the adverse party in damages. *Id.*

7. Damages for the breach of contract are those which are incidental to and caused by the breach, and may reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract. *Williams v. Barton*, 13 L. R. 404.

8. In an action for Damages for slanderous words spoken and uttered publicly of and concerning the plaintiff, the latter may amend, and insert an allegation of the falsity of the charges and

malice on the part of the defendant. *Mittreud v. Delassize*, 13 L. R. 416.

9. According to the article 907 of the Code of Practice, the Supreme Court is empowered to condemn the appellant to pay damages for a frivolous appeal, if the appellee claims them, but they cannot exceed ten per cent on the amount in dispute, including interest. *M'Coy's executors v. Pritchard et al.*, 13 L. R. 428.

10. So where the judgment bears five per cent interest, the damages cannot exceed five per cent. *Id.*

11. Damages as for a frivolous appeal, will be given when the points relied on by the appellant are untenable and frivolous. *Hubbell v. Clannon*, 13 L. R. 494.

12. Damages on protested bills of exchange are given in lieu of all charges such as premium, protest and postage. The holder can claim interest on the damages from the protest, but is not entitled to the difference of exchange. *Robert & Williams v. Commercial Bank*, 13 L. R. 528.

13. A party who has reasonable grounds to believe that he has a good cause of action, and brings his suit, is not liable in damages to the adverse party, if he loses or discontinues his case. *Henry v. Dufilho Jr.*, 14 L. R. 48.

14. A party plaintiff is not bound to repair the damages which he may cause to others by the legitimate exercise of his legal rights. *Id.*

15. But, if a person sues without color of title, and malice is shown, or may be inferred, the adverse party is entitled to recover in an action of slander of title. *Id.*

16. The jury are the peculiar judges of the *quantum* of damages. *Morgan v. Lard et al.*, 14 L. R. 286.

17. Damages may be assessed at an *annual* sum; and where the petition shows no period from which they shall be computed, and the verdict affixes none, the Court may give them from judicial demand, and until the surrender of the premises to the successful claimant. *Id.*

18. Where a sheriff acts honestly, being a public officer he must be protected against excessive and vindictive damages. *Smith v. Bradford et al.*, 14 L. R. 281.

19. So, where slaves are illegally removed from a plantation they are cultivating, by the sheriff under a writ of seizure, a bare remuneration for the *loss of time* should be the measure of damages. *Id.*

20. An action of damages for malicious prosecution and false imprisonment, should not be maintained without clear proof of *malice*, and the *absence* of probable cause of guilt. *Maloney v. Doane*, 15 L. R. 278.

21. Whether the defendant disclosed the ground of his belief in his affidavit, charging the plaintiff with a criminal offence, is immaterial. In an action of damages for malicious prosecution,

&c., he will be permitted to show his motives, and the absence of malice. *Maloney v. Doane*, 15 L. R. 278.

22. Legal interest is the only damages allowed for delay in the performance of an obligation to pay money, but cannot apply, or be taken as the measure of damages, when the obligation is destroyed by the dissolution of the contract, and in an action for the rescission of the sale. *Derepas v. Shallus*, 15 L. R. 371.

23. Penalties are given, in favor of persons unable to establish the extent of the injury or damage they may have sustained. *Fenner v. Watkins et al.*, 16 L. R. 204.

24. Damages are allowed exactly in proportion to the injury sustained by the party claiming them. *Id.*

25. Where an unauthorised opposition ferry is set up against a ferry regularly leased out at public auction, the person setting up the opposition ferry, is liable in damages to the lessee of the ferry. *Id.*

26. Damages as for a frivolous appeal will not be allowed on the affirmance of judgment dissolving an injunction, which already gives ten per cent interest, and twenty per cent damages. *Fulton v. Gorton's executor*, 16 L. R. 320.

27. In a commutative contract for the delivery of a quantity of coal, for which a certain price was to be paid, in a particular manner, the whole contract to depend for its fulfilment, on certain arrangements to be made by a kind of mutual agent, who failed to carry out the views of the parties: *held*, that no damages are recoverable for the non-delivery of the coal. *Reed et al. v. Wright*, 16 L. R. 580.

28. Damages for a frivolous appeal will not be allowed when the matter in dispute is not for a sum of money, as the rescission of a sale of a house and lot, and its value is not shown. *Lopez et al. v. Bergel, f. w. c.*, 17 L. R. 257.

29. Where the injury complained of is injury done to the plaintiff's works, and the matters in contest are the actual damages or injury done and sustained, the Court will not enquire into the plaintiff's titles or chartered rights to make the public works in question. *Orleans Navigation Co. v. Municipality No. 2*, 17 L. R. 269.

30. Damages for the wrongful suing out of an injunction, may be claimed in the same suit under the act of 1831, in cases embraced by it; but from its wording, it appears to apply particularly where judgments are enjoined. *Morgan v. Driggs et al.*, 17 L. R. 176.

31. Redress in damages should in all cases be proportioned to the injury sustained, unless when given as an example to deter others from similar conduct in future. *Stinson, curator, &c. v. Buisson*, 17 L. R. 567.

32. An action for damages claiming \$500, for injury sustained in assaulting and beating the plaintiffs without provocation. *Judg-*

ment for the full amount supported by the evidence and affirmed. *Fredwost and wife v. Daily et al.*, 18 L. R. 535.

33. The assessment of damages is the peculiar province of a jury. When excessive, relief will be granted, but a strong case must be made out to justify the interference of the appellate Court. *Barney v. De Russy, sheriff and others*, 1 R. R. 75.

34. Damages will not be allowed, where the appellee prays for and obtains an amendment of the judgment. *Lay v. Irwin*, 1 R. R. 121.

35. Damages for a frivolous appeal cannot be granted by the Court, when they have not been asked for by the appellee. *Thayer v. Little John and others*, 18 L. R. 140. *Aikin and others v. Freeland and others*, 1 R. R. 573.

36. In actions against officers for neglects, the redress in damages should always be proportioned to the injury really sustained. It would be unjust in such cases to place the plaintiff, at the expense of the defendant, in a better condition than he would have been had no such neglect occurred. *Bonnabel v. Bouligny, sheriff*, 1 R. R. 292.

37. One who has received an injury, for which he is entitled to damages in a civil action, and which may give rise to a criminal prosecution, may lawfully receive a sum, the amount of the damages to which he is entitled, even when offered in the hope, that, being satisfied therewith, he will not resort to a criminal prosecution; and a promise to pay such damages is a good consideration for a note. *Butterly v. Blanchard*, 1 R. R. 340.

38. A remission, in the Court below, of the amount of damages allowed by the jury, will stop the party from setting up any claim for damages in the appellate Court. *Kemp and others v. Womack*, 1 R. R. 369.

39. The plaintiff in a petitory action, who has reasonable ground to believe that he has good cause of action, will not be liable to damages in discontinuing or losing his case. *Walden v. Peters*, 2 R. R. 331.

DEBTOR AND CREDITOR.

1. A principle which enables a debtor to put his creditors at defiance, and dictate to them the terms on which they are to receive a portion of their claims, is repudiated by law. *Graves et al. v. Roy*, 13 L. R. 454.

2. So where the debtor, residing in Virginia, made an assignment of half his interest in a ship at sea, for the benefit of certain of his creditors, and excluded those who dissent and refuse to release him: *held*, that such an assignment is null and void as against dissenting creditors. *Id.*

3. It has been decided in Virginia that an assignment with a condition for a release of the debtor, would not render a deed of trust invalid, provided the debtor conveyed the whole of his property for the benefit of his creditors. *Graves et al. v. Roy*, 13 L. R. 454.

4. The property of the debtor is the common pledge of all his creditors and when in failing circumstances he can make no disposition of it to the prejudice of his creditors. *Townsend v. Louisiana State Marine and Fire Insurance Co.*, 13 L. R. 551.

5. So a voluntary assignment by a debtor, which provides that a certain debt shall be paid *in full*, and the other creditors that may become parties to the act are to be paid *pro rata*, is void on its face, which may be treated as a nullity; and the property thus assigned is liable to seizure by the judgment creditors. *Id.*

6. Where the plaintiffs claim the value of certain property, seized by the defendants, as belonging to the common debtor, and consent that it be sold, and receive the proceeds, they cannot recover the real value from the seizing creditor, if it was sacrificed. *Lowery & Co. v. Lavillebeuvre et al.*, 14 L. R. 55.

7. A debtor doing business as a merchant without any fixed domicile in the place, living with his family in a boarding-house, is liable to arrest and sequestration of his moveables and baggage, at the suit of his landlord. *Wooster v. Salzman*, 14 L. R. 98.

DEFAULT, JUDGMENT BY.

1. A judgment by default on a promissory note or other obligation alleged to have been signed by the defendant, cannot be made final without proof of the signature. Art. 324 of the Code of Practice does not dispense with this proof. The obligation of the defendant to confess or deny his signature, does not arise until he answers. *Griffin, administratrix v. Caldwell and others*, 1 R. R. 15.

2. The three days required, by art. 312 of the Code of Practice, to elapse before a judgment by default can be made final, must be judicial days. *Fowler v. Smith and husband*, 1 R. R. 448.

DELEGATION.

1. There cannot be a more formal acceptance of a delegated debtor, than by suing him on his obligation. *Walton v. Beauregard*, 1 R. R. 301.

DEMAND.

1. The amicable demand is founded upon the presumption, that if made before suit, the defendant would pay and save costs; and where no amicable demand has been first made, if upon service of citation, the defendant complies with the prayer of the petition, the plaintiff must pay the costs. But it is otherwise if he comes into Court to defend the action, and judgment goes against him. *Amory et al. v. Black*, 13 L. R. 264.

2. When there is no amicable demand proved, and the want of it is specially pleaded, the judgment will not be affirmed with damages, although the appeal is frivolous. *Florance v. Alston*, 13 L. R. 278.

3. So, Where the defendant appeared and pleaded the want of an amicable demand, but had no valid defence; he was required to pay all the costs in the inferior Court after his first appearance there. *Id.*

4. The amicable demand is admitted by the failure of the defendant to answer an interrogatory put to him to that effect. *Burns v. Schaumberg*, 13 L. R. 286.

5. Want of amicable demand, specially pleaded and shown, saved the defendant the costs of the *original citation*, and also those of appeal, by reversing the judgment. *Saillard v. Turner et al.*, 14 L. R. 259.

6. Where a note is payable at a particular place, payment must be *demanded there*, before recovery can be had against the sureties in the note. *Fort v. Cortes & La Place*, 14 L. R. 180.

DEPOSIT.

1. The privilege of a depositor is only upon the price of the thing deposited, where it has been sold. *Whatley v. Austin, administrator*, 1 R. R. 21.

2. It is of the essence of the contract of deposit, that the thing deposited is to be preserved and returned in kind. *Id.*

3. The proprietors of a cotton yard and press, will be responsible for cotton deposited with them, and not accounted for. *Marr and others v. Barnes*, 1 R. R. 190.

4. Art. 2939 of the Civil Code applies to common carriers; and so does art. 2938, under certain modifications. *Bailey v. Stewart*, 1 R. R. 410.

DEPOSITIONS.

1. Where the deposition of a witness is not annexed or fastened

to the commission and process verbal, but is enclosed with them in an envelope, sealed and directed to the clerk, it is sufficient. *Parker v. Brashear & Barr*, 16 L. R. 69.

2. Where a commission is addressed to a person by name, in another State, as a special commissioner to take depositions, his capacity and signature, and that of the witness who testifies before him, are not required to be proved. *Harrison v. Bowen*, 16 L. R. 282.

3. Where a commission to take deposition of witnesses, is directed to a person by name, as a commissioner in another State, there is no necessity of proving his signature. *Gordon v. Nelson*, 16 L. R. 321.

4. If the return or certificate of the commissioner is attached to the deposition by a wafer and returned with it it is sufficient. *Id.*

DISCUSSION.

1. A defendant who insists on the plea of discussion, must specially point out property and tender the costs. It is not sufficient to aver that the party is ready to advance the costs, and that the principal debtor has property in a particular parish. *Banks v. Brander et al.*, 13 L. R. 274.

DISTRINGAS.

1. A notary, commissioned by the judge of the Court of Probates to make the partition of community property, is the ministerial officer of the Court; and, on his certificate of a refusal by the party in custody of the property to produce the same, a *distringas* may be issued to enforce a compliance. *Stewart v. Pickard and others*, 1 R. R. 415.

DIVORCE.

1. An action for divorce, based on abandonment of the husband, cannot be maintained, until a decree for a separation of bed and board be rendered, two years previous to the application of a divorce with proof of abandonment for five years. *Harman v. McLelande*, 16 L. R. 26.

2. The admission or confession of the husband, that he lives with another woman, in a foreign country, is insufficient evidence to authorize a divorce, and to dissolve for ever the bonds of matrimony. *Id.*

3. The mere acknowledgment of the truth of the facts alleged, made by either of the parties, even in an authentic act, can never be deemed sufficient foundation for a decree of separation from bed and board; *a fortiori* of a divorce. *Harman v. McLelande*, 16 L. R., 26.

DOMICIL.

1. The power of the husband over the wife, and her capacity to sue, ratify, or make a contract, is fixed by the law of their domicile. *Garnier v. Poydras*, 13 L. R. 177.

2. Where a debtor absconded from his creditors in France, and came to the United States, settled in Louisiana, and died here, where his succession was opened and administered: *held*, that no other domicile can be assigned but his original one in France, as he did not appear to have manifested an intention to establish himself in Louisiana. *Graviaon v. Richard's executors*, 13 L. R. 293.

3. The fact of a person remaining in a foreign country, without any intention of establishing himself there, does not operate a change of domicile. But as soon as the will of making a permanent establishment in the country, combined with the facts of his residence, even for a few days, fixes the domicile. *Id.*

4. Although exiles have two domiciles, in one sense, yet as to their successions, the original domicile is regarded as the true one. In questions of doubt, the original domicile is to be considered as the true and legal one. *Id.*

5. The Courts here have the power, and it is their duty to order the remission of funds belonging to a foreign succession opened here, to the representatives and creditors authorised to receive them, by the Courts of the domicile of the deceased. Every motive of public policy requires it. *Id.*

6. The articles 42 and 43 of the Louisiana Code, only provide for a change of domicile by persons already residents of the State, and not those coming from another State. *Boone v. Savage*, 14 L. R. 169.

7. It requires a residence of one year in this State to acquire a domicile; until then, they are liable to be sued by attachment as non-residents. *Id.*

8. The declaration before the Parish judges, *from which, and to which* a party *intends* to remove his domicile, is evidence of the intention only. The domicile is only changed by an *actual residence* in the new Parish. *Nelson v. Botts*, 16 L. R. 596.

9. In a conservatory action, to enforce the provisions of a will, and cause to be rescinded the sale of certain slaves, made contrary to its provisions, a remote vendee of two slaves, residing in an-

other parish, cannot be sued and made to answer at a different domicile than his own. *Poydras v. Taylor et al.*, 18 L. R. 17.

10. Where the defendant owned a plantation and dwelling house in a distant parish, where he has resided for several years, except occasional absence in travelling; and afterwards opened a commission house in New-Orleans, with a view to a commission business, and his family living at a boarding-house: *held*, that it is not such a change of domicile as will authorize a suit against him in two months afterwards, at his new residence. *Williams v. Henderson*, 18 L. R. 557.

11. Defendant's domicile considered still in the parish where he *has resided* permanently, notwithstanding his removal to New-Orleans, with a view to the commission business there for a short time. *Hall & Bein v. Henderson*, 18 L. R. 563.

12. By applying for the administration of an estate, in a parish different from that of his domicile, a party subjects himself to the authority of the Court within whose territorial jurisdiction the administration is granted, in every thing that concerns such administration. *Gallier v. Walsh and another*, 1 R. R. 226.

13. Wherever his domicile may be, a syndic of the creditors of an insolvent is always amenable to the Court under whose authority he was appointed, and to whom he is accountable for his administration. By accepting the appointment, he waves any right to except to the jurisdiction on the score of domicile. So, where a syndic has been removed, an action against him for a balance due to the creditors, is properly brought before the Court seized of the *concurso*. *Rodriguez, syndic v. Dubertrand and another*, 1 R. R. 535.

14. A domicile of choice can only be acquired by one who is *sui juris*; consequently, it cannot be acquired by a lunatic or minor. *Succession of Robert*, 2 R. R. 427.

15. Case of *Gravillon v. Richard's executor et al.*, 13 L. R. 293, overruled, so far as the *dictum*, that "as soon as the will of making a permanent establishment in the country is combined with the fact of residence, the residence, even for a few days, fixes the domicile," applies to the acquisition of a residence in this State. *State v. Judge of Court of Probates of New-Orleans*, 2 R. R. 449.

16. An uninterrupted residence of one year within the State, is necessary under the acts of 7th March, 1816, and 16th March, 1818, to acquire a domicile in this State; and until then, a party may be sued by attachment as non-resident. It is not necessary that he should have remained the whole time within the State, provided that, during any temporary absence, he retained an office or room as his residence, and left some authorised agent to represent him. *Id.*

17. One who left the State to discharge the duties of a senator of the United States, and who, on resigning, was made a member of the President's cabinet, and subsequently a foreign minister,

will not be considered as having lost his domicil in this State, where no act has been done evincing any intention to acquire a newdomicil. C. C. 46; and prescription will run against him, as if actually within the State. *Walden v. Canfield*, 2 R. R. 466.

18. Where a party has repeatedly and publicly declared himself to be a resident of a particular parish, he will not be allowed, though actually residing elsewhere, to gainsay his own declarations, which may have misled others. *Commercial Bank of Natchez v. King*, 3 R. R. 243.

19. Where a mother, who had been confirmed as the natural tutrix of her minor children, marries a second husband domiciliated in a different parish, without having convened a family meeting to determine whether she shall be continued as tutrix, both herself and the minors will acquire immediately, by the very fact of the marriage, a domicil in the parish of the second husband. C. C. 48. *Succession of Winn*, 3 R. R. 303.

DONATION.

1. Under the Spanish law in making donations, no particular form or clause was required; the consent of the parties, the thing given and the tradition, were sufficient. Even verbal sales and donations were permitted when tradition followed. *d'Orgenoy et al. v. Droz*, 13 L. R. 389.

2. A sale without a *price*, or for a fictitious one, is null as a sale, but is, nevertheless, valid as a donation, provided tradition follows. *Id.*

3. No action can be sustained on a breach of promise to make a donation. *Williams v. Barton*, 13 L. R. 404.

4. Every donation, or advantage given to heirs, is liable to collation among the co-heirs, unless expressly exempted by the donor. *Burton's heirs v. Burton et al.*, 14 L. R. 352.

5. The donation of slaves imports an absolute transfer of property, and they are at the donee's risk, who is entitled to all the profits and encrease, and must bear their deterioration and loss. *Id.*

6. The universal legatee under a will, and a universal donee under a marriage contract, are, by mere operation of law, seized of the whole estate, and no demand whatever is necessary from the heirs at law. *Fowler et al v. Boyd*, 15 L. R. 562.

7. So, where the husband and wife, in their marriage contract, made to each other mutual and reciprocal donations of the whole of each other's property, *to vest in the survivor*; on the death of the wife, the husband became the universal donee, and seized of her whole estate. *Id.*

8. A note executed *in extremis* in favor of the concubine for a sum of money, shown to have been in lieu of the value of a house

and lot which the deceased intended to bequeath, but was unable to make his will; is considered as a disposition *mortis causâ*, and not being clothed with the formalities of law is without effect. *Barriere f. w. c. v. Gladding's curator*, 17 L. R. 144.

9. No disposition *mortis causâ* can be made but by last will and testament; and when it is clearly proved that the deceased intended to make his will for the avowed purpose of bequeathing to his concubine certain immoveable property, but was prevented and gave a note for its value, no recovery can be had on it. *Id.*

10. A donation of slaves without estimation under the old Civil Code is null, although accompanied by delivery, as delivery only applied to *moveables*; but under the Louisiana Code a donation of a house and lot is valid without *estimation* or appraisement, which only is required in cases of moveable effects. *Macarty v. Commercial Insurance Company*, 17 L. R. 365.

11. A testimonial proof will not be received to show that in case of *donation* of a house and lot by authentic act, it was agreed the donor should continue to receive and enjoy during his life time, the *rents* of the property. *Id.*

12. The article 904 and two following of the Louisiana Code, in both languages, when construed together and interpreted according to the spirit or intention of the legislature, provide only that ascendants or *donors* are entitled to inherit to the exclusion of all others, the real property and slaves given by them to their children, or their decendants, *who die without posterity*, when these objects are found in their succession. *Rouanet v. Hunt, tutor, &c.*, 17 L. R. 407.

13. The right to inherit, or right of return or reversion allowed by law to the donor, does not accrue unless the donee *dies without posterity*, and depends upon this contingency. *Id.*

14. So the interpretation of the 904th article of the Louisiana Code given in the case of Prejean's heirs *vs.* Le Blanc (3 L. R. 19) is *overruled* and ceases to be considered a proper and correct interpretation. *Id.*

15. Where the defendant made a verbal donation of a slave to his son, and at his death, as one of a family meeting advised the sale of the slave, as the property of the minor child of the deceased, he cannot claim back either the slave or the proceeds, although the donation *per se* did not divest him of title. *Gillispie v. Day*, 19 L. R. 263.

16. The donor is only entitled to the reversion of the thing donated when donee *dies without posterity* and it is found in his succession. *Id.*

17. The capacity of the donor to give, in relation to donations *mortis causâ*, reference must be had to the time of the donor's death, because it is not until then that the donation takes effect. *Criswell v. Seay et al.*, 19 L. R. 528.

18. So where the husband, having then two children, makes in

his marriage contract, a donation or disposition *mortis causâ*, of all the property of which he may die possessed, and which he may lawfully dispose of, to *his intended wife*, if she survives him; and his children die first, leaving no forced heirs, at his death *his wife* becomes *his universal donee*, and is entitled to his estate. *Criswell v. Seay et al.*, 19 L. R. 528.

DONATIONS INTER VIVOS.

1. All donations *inter vivos* must be passed before a notary and two witnesses. *Brittain v. Richardson*, 3 R. R. 78.

2. The right of children to attack donations *inter vivos*, made by their parents, which exceed the disposable portion, accrues only after the death of the latter; for they might survive all their forced heirs, in which event, all donations would be valid and binding. *Succession of Ludewig*, 3 R. R. 99.

3. Donations *propter nuptias* were not excepted from the provision of art. 48, tit. 2, book 3, of the Code of 1808, that "no donation *inter vivos* of moveable property or slaves, shall be valid for any other effects than those of which an estimate, signed by the donor or donee, or by those who accept for him, is annexed to the record of the donation." The omission of the estimate, in a donation of slaves, is not cured by the delivery of the slaves. *Harlin v. Léglise*, 3 R. R. 194.

4. Donations *propter nuptias* are not excepted from the general rules prescribed by the Code of 1808, in relation to other donations. *Id.*

5. The rights acquired by children, legitimated by subsequent marriage of their parents, have no effect against gratuitous dispositions previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556. *Liautaud v. Baptiste*, 3 R. R. 441.

DONATIONS MORTIS CAUSA.

1. The article of the Civil Code providing that a will written out of the presence of the witnesses, shall be presented in their presence and declared by the testator to be his, does not require a manual presentation; it will suffice, if after the instrument has been read to him in their presence, he declares to them that it contains his last will. *Falkner and wife v. Friend, executor*, 1 R. R. 48.

2. The great difference between a nuncupative will by public act, and one under private signature, is, that the former must make

full proof of itself, and bear on its face evidence that all the formalities necessary to give it validity have been complied with, while the latter need not mention the fulfilment of any formalities, it being sufficient if it appears when the will is admitted to probate, that they have been observed. *Falkner and wife v. Friend, executor*, 1 R. R. 48.

3. When all the requisites pointed out by law for the validity of a nuncupative will by public act, do not appear from the instrument itself, the will must be declared null, because no omission to mention such requisites can be supplied by testimony. *Id.*

4. The omission of a material circumstance in the probate of a nuncupative will under private signature, can only prevent its execution. It must clearly appear from the testimony, that some of the formalities required by law in making such a will have been omitted, before it can be annulled. *Id.*

5. To authorize the admission to probate of a nuncupative will under private signature, executed in the presence of only five witnesses, it must appear from the will or from testimony offered to the judge of the Court of Probates, that they resided in the place where the will is received, or that a greater number of witnesses could not be had. *Id.*

6. Substitutions in favor of the grand children of the testator, or of the children of his brothers or sisters, are prohibited by the Code of this State. *Rachal, tutor, and another v. Rachal and husband*, 1 R. R. 115.

7. Substitutions are prohibited by the Code, even where the provisions of the will do not tend to alter the course of descents; and whether conditional or unconditional. *Id.*

8. The distinction between a disposition by which the usufruct is given to one, and the naked property to another, and a substitution, is that by the former the naked property vests immediately on the death of the testator, and must therefore be to some one *in esse*, capable at the time of receiving, and clearly designated by the will; while those who are to take under a substitution, may be unknown to the testator, or not in existence at the time of making the will. *Id.*

9. A bequest of certain property, with a provision that the legatee shall not alienate any part under any pretext, and that in the event of her dying before her husband, it shall pass to her children, contemplates the children in existence at the time of her death, and bestows on them no rights whatever until that event, and will be considered a substitution, and void as such. *Id.*

10. Article 1576 of the Civil Code, which provides that in the country it suffices for the validity of nuncupative testaments, under private signature, that they be passed in the presence of three witnesses residing in the place where the testament is received, or of five witnesses residing out of the place, provided that a greater number cannot be procured, does not contemplate a physical or absolute impossibility. Reasonable diligence to procure

the witnesses, is all that is required. *Maria and another v. Edwards, executor, and another*, 1 R. R. 359.

11. The formalities and conditions required by law for the emancipation of slaves, cannot be dispensed with by a testator who orders his slaves to be set free, any more than by a master who desires to emancipate them during his life time. *Id.*

12. Where a sum of money has been left to be expended under the direction of a particular individual for the promotion of a specified object, he may appoint an agent to receive it, though its disbursement for the purposes indicated by the testator must be necessarily made by himself, or under his direction. *Succession of Morgan*, 1 R. R. 514.

13. The capacity to dispose of real property must be determined by the *lex rei sitæ*. *Bonneau v. Poydras*, 2 R. R. 1.

14. By the laws of France the widow becomes the tutrix of her minor child immediately after the death of her husband, and needs no letters of tutorship to act as such; and, by the same laws, she is entitled to the enjoyment of all the property of her child, until he reach the age of eighteen, or be emancipated. A widow, residing in France, may oppose, in the Courts of this State, the homologation of the will of her husband, and stand in judgment for her child. *Succession of Senac*, 2 R. R. 258.

15. The testator, a resident of Louisiana, made an olographic will on the 8th of May, 1836. On the 10th of the same month, he married; and on the next day sailed, with his wife, for France, intending to reside permanently in that country. On the 10th of April, 1837, a child was born of the marriage, and in August, 1838, the testator died. *Held*, that under articles 483, and 10 of the Civil Code, the will having been made in this State, its validity must be tested by the laws of Louisiana, and not by those of France. *Id.*

16. A will is not revoked, under the laws of France, by the subsequent birth of a child. *Aliter*, in this State. Civil Code, article 1698. *Id.*

16. The only exception to the rule laid down in article 483 of the Civil Code, that persons who reside out of the State cannot dispose of property they possess here, in a manner different from that prescribed by its laws, is to be found in the 10th article of the Code; and it is only under the conditions mentioned in that article, that foreign laws are permitted to operate in the disposition of property in this State. *Id.*

18. The meaning of the third paragraph of article 10 of the Civil Code, is, that the rule, that the effect of acts passed in one country to be executed in another must be regulated by the laws of the latter, does not hold in relation to testaments and donations *mortis causâ*, where the testator or donor resided abroad when the act was executed and at the time of his death. It is only when both these circumstances occur, that he will be considered as hav-

ing made his will with reference to the laws of his domicil. *Succession of Senac*, 2 R. R. 262.

19. Where a remunerative donation exceeds the disposable portion, the donee or legatee is bound to prove the value of his services. If proved to be equal to, or greater than the bequest, no reduction can be made; otherwise, it must be reduced to the estimated value of the services. C. C. 1500, 1512. But where such donation does not exceed the disposable portion, the declaration of the testator as to the services and their value, will be conclusive on the heirs, and no proof will be required from the legatee. In the latter case, the remunerative disposition must be viewed as an ordinary bequest, and the services as the motive or inducement for making it. *Succession of Fox*, 2 R. R. 292.

20. One who avers that a remunerative legacy exceeds the disposable portion, must show it. Until this be established, the donee or legatee is not bound to prove the value of his services. *Id.*

21. The bequest of a sum of money for a specified purpose, is a particular legacy. Such legacies are a charge upon the whole estate, and become the personal debt of the heir, and must be discharged in preference to all others, as if debts of the estate, though they exhaust the whole succession, or all that remains after the payment of the debts and the contribution for the legitimate portions where there are forced heirs. C. C. 1627, 1661. *Succession of Milne*, 2 R. R. 382.

22. Universal legatees are bound, personally, not only for the debts and charges of the succession, but to discharge all the legacies, unless in case of reduction (C. C. 1603); and where they wish to take seisin of the succession from the testamentary executor, they must offer him a sum sufficient to pay the moveable legacies, (C. C. 1664.) *Id.*

23. Under art. 1682 of the Civil Code a Court of Probate cannot refuse to order the execution of a foreign will, when shown to have been duly proved before a competent judge of the place where it was received. The object of the law is to give to foreign wills the same effect in the State, which they would have in the country in which they were executed, when they have been duly proved in the latter. But where an olographic will has been received by a foreign tribunal without proof of the writing or signature, such proof not being required by the laws of the country unless the genuineness of the will be attacked, it cannot be executed here, without being first proved according to law before the proper Court in this State. *Succession of Robert*, 2 R. R. 427.

24. Where by the laws of the country in which a foreign will was executed, the original cannot be removed, the will may be ordered to be executed here on the production of a certified copy thereof, and of testimony taken abroad, under a commission, establishing the genuineness of the original. *Id.*

25. As to moveables, the capacity or incapacity of a testator must be determined by the law of his domicil. *Succession of Robert*, 2 R. R. 427.

26. A bequest by a testatrix, a minor natural child, without descendants or ascendants except her mother, domiciled in this State, where all her property, with the exception of her apparel and furniture, was situated, but who had lived for many years in France, where she made her will and died, to one whom she intended to marry, "of all which the law permits her to dispose of," will be construed to have been made with reference to the law of this State, by which the whole of her estate will go to the legatee, and not to that of France, by which she could have disposed of but one half. *Id.*

27. A bequest of a sum of money "to the orphans of the First Municipality of New-Orleans," may be claimed and recovered by the City Council of that Municipality, who are authorised to regulate its distribution among the objects of the testator's bounty. C. C. 1536. *Succession of Mary*, 2 R. R. 438.

28. In regard to the creditors of a succession, the administration of the assets and the payment of the debts of the deceased must be governed exclusively by the law of the country where the administrator or executor acts, and from which he derives his authority to collect the assets. No provision of the will can subject them to the necessity of seeking payment elsewhere. Otherwise, as to legatees, who have no claims against the succession but such as the testator pleased to give them, who might make his bounty conditional. They must take their legacies, if at all, *cum onere*. *Id.*

29. Posterior testaments, which do not expressly revoke prior ones, will annul such dispositions in them, as are incompatible with, contrary to, or entirely different from the provisions of the former. Thus, the appointment of one as sole executor, will annul any appointment of another executor made in a previous will. *Succession of Bowles*, 3 R. R. 31.

30. The probate of a will is a judicial proceeding, and must be authenticated according to the act of congress of 26th May, 1790. *Same*, 33.

31. The certificate of the clerk of a Court in another State, that "the transcript is a true copy from the original filed in my office, as proven in open Court, at the October term, 1841", and ordered by the Court to be recorded, is not such evidence of the testament having been duly proved before a competent judge of the place where it was received, as will authorize its admission to probate and execution in this State. It does not show how the will was proved, nor what was the order of the Court. Duly certified copies of the orders or decree in relation to the proof and recording of the will, should have accompanied the transcript of the latter. *Id.*

32. An instrument, the real object of which was a disposition

mortis causâ, if executed without the formalities required by law to give it validity as such, can have no effect. *Brittain v. Richardson*, 3 R. R. 78.

DONATIONS.

1. A marriage contract passed before a Justice of the Peace, is null; and any gifts or donations made in it, are null and void. *Flores v. Lemee, administrator*, 16 L. R. 271.

A *Donation propter nuptias* makes no part of the wife's dowry, and she has no mortgage for its restitution. *Id.*

3. Every *donation inter vivos* between husband and wife, by marriage contract, or other matrimonial agreement, is subject to the general laws prescribed for ordinary donations; and especially in article 1523 and the following of the Louisiana Code, under the penalty of nullity. *Id.*

DONATIONS GENERALLY.

1. Where donations *inter vivos* or *mortis causâ*, are clothed with the formalities required by law to give them validity, the forced heirs alone can sue for their reduction, in case they exceed the disposable portion; but when void for the want of such formalities, the legitimate heirs or other representatives of the estate, as well as the forced heirs, may sue to annul them. *Brittain v. Richardson*, 3 R. R. 78.

2. The father of certain natural children, who had made a sale of all his property to a third person, legitimated his children by a subsequent marriage. After the death of the father, the property was sold to another. In an action by the children against the latter, to recover the property, on the ground that the sales were simulated, plaintiffs alleged that it was agreed between the deceased and his vendee, that, notwithstanding the sale, the former should remain the owner of the property, which should be reconveyed to him when required, or to his children in case of his death, and that the sale was in the nature a *fidei commissum*, and, as such, prohibited by law. *Held*, that the interest of the plaintiffs, who were subsequently legitimated, not having existed at the date of the first sale, parol evidence was inadmissible to prove that it was a *fidei commissum*; that the object of the action is to enforce the *fidei commissum* complained of, and that plaintiffs cannot, under the pretext that it was a *fidei commissum*, be allowed to establish the simulation of the sale, and thereby give effect to the very agreement prohibited by law. *Liataud v. Baptiste*, 3 R. R. 441.

3. The object of the law-maker being to prevent those whom it

disables from receiving donations, from secretly enjoying them, all *fidei commissa*, even those in favor of persons capable of receiving, are prohibited. C. C. 1507. *Id.*

DOUBT.

1. In doubtful cases the conclusion should be in favor of the party who strives to avoid a loss, rather than in favor of one who seeks a gain. *Bronaugh v. Neal*, 1 R. R. 23.

EMANCIPATION OF SLAVES.

1. The formalities and conditions required by law for the emancipation of slaves, cannot be dispensed with by a testator who orders his slaves to be set free, any more than by a master who desires to emancipate them during his life time. *Maria and another v. Edwards, executor and another*, 1 R. R. 359.

2. Where a slave ordered to be emancipated by will, sues to establish her right to freedom, she must allege and prove that she is thirty years of age, or a native of the state, and that she has behaved well during the four preceding years. Act 9 March, 1807. C. C. art. 185. The act of 31st January, 1827, effected no other change in the law than to authorize, under certain circumstances, emancipation before the thirtieth year. *Nolé v. De St. Romes*, 3 R. R. 484.

EMPLOYER AND EMPLOYEE.

1. To render the employer or hirer of a slave liable for the damage occasioned by him, it must be done through his neglect, while he is actually engaged in the functions or duties entrusted to him. *Gaillardet v. Demaries*, 18 L. R. 490.

2. Where the damage is done wilfully and wickedly by a slave hired to another instead of doing it through neglect or unskilfulness, the employer is not liable. *Id.*

3. The employer is however liable for damages occasioned through the neglect, imprudence, or unskilfulness of his employee, whether he be a free person or a slave. *Id.*

ERROR.

1. A judgment will not be reversed on an assignment of error,

where such error might have been cured by evidence legally admitted. *Harris, for the use &c. v. Alexander and another*, 1 R. R. 30.

2. In a suit by the holder against the drawer of a promissory note, negotiated after maturity, which had been given on the settlement of a partnership, formerly existing between the drawer, the payee, and a third person, the defendant may be relieved by showing error in the settlement, without making his partners parties to the suit. *Ford v. Dosson*, 1 R. R. 39.

3. A witness may be admitted to prove that the date of a bond offered in evidence was a clerical error, and to establish the real time of its execution. *Belot v. Donnavan*, 1 R. R. 257.

4. Errors or irregularities in a partition of community property, made under the authority of a Court of Probates, may be corrected by opposition to the homologation of the partition. *Stewart v. Pickard and others*, 1 R. R. 415.

5. Where the petition claims interest only at five per cent, but refers to the note annexed to it, which bears interest at ten per cent, and prays for general relief, the error may be corrected by reference to the note, and judgment be given for interest at the latter rate. *Leverich and another v. Walden*, 1 R. R. 469.

6. An error into which the jury have fallen in fixing the period from which interest is allowed, which appears from the facts found by them and from the records of the suit, may be corrected by moving for a new trial, or by an application to the judge. Where such error does not exceed the fraction of a dollar, and no attempt has been made to correct it below, the judgment will not be disturbed on appeal. *Mullen v. Miller*, 2 R. R. 23.

7. Surveys made by surveyors in the service of the United States, though sanctioned by the principal deputy surveyor of the district, may be corrected when erroneous. *Kittridge v. Landry*, 2 R. R. 72.

8. Errors in the return of process should be amended so as to make the return conform to the truth; and the party entitled to demand such amendment, cannot be deprived of the right, by the expiration of the term of service of the sheriff or deputy sheriff who committed the error. Nor is it any objection, that the amendment will affect rights acquired by third persons. *Elmore v. Bell*, 2 R. R. 484.

9. A sheriff may amend his return, even after a contest in which its validity is attacked. *Id.*

EVICTIION.

1. A *Bona fide* vendor, on eviction of his vendee, since the adoption of the Louisiana Code, is not bound to indemnify the latter,

for profits not made, or restore absolutely the *increased value* of the thing sold, above the price of the original sale. *Bissell et ux v. Erwin's heirs*, 13 L. R. 143.

2. But in cases of eviction, such increased value of the thing sold, above the price of the original sale, as the parties might have reasonably anticipated at the time of the contracts, should be considered as *profits made* by the buyer, and ought, in all cases, to form a part of the damages for which the vendor is liable on his warranty. *Id.*

3. The defendant, on eviction, will be allowed to produce evidence of the increased value of the property at the time of eviction, above the original price at which he purchased. *Id.*

4. The vendor, when the vendee demands security against the danger of eviction, is only bound to offer a person able to contract, with sufficient property, and domiciled within the jurisdiction of the Court. The purchaser or vendee, is not entitled to demand real security. *Cross v. Armor*, 13 L. R. 477.

5. Since the adoption of the Louisiana Code, as an amendment, and in repeal of the Code of 1808, the *increased value* of the property at the time of eviction is not necessarily the standard of damages to be paid by the warrantor to the party evicted. *Webb v. Gorman et al.*, 14 L. R. 38.

6. When the vendee has been evicted by an outstanding mortgage, and claims damages from his vendor, parole evidence is admissible to show the amount of damages actually sustained; notwithstanding the vendee may have been in arrears of interest or rent, at the time of eviction. *Bissell et ux v. Erwin's heirs*, 15 L. R. 94.

7. Where the vendee sues for damages on account of eviction, evidence to show a putting in default by the vendor in demanding rent or interest due, is not admissible. It can have no influence on the claim for damages, after eviction. *Id.*

8. When the eviction is admitted by the pleadings, the production in evidence of the writ or execution under which the sheriff acted, is sufficient without the judgment under which it issued. *Id.*

9. The increased value of the property, form a part of the damages assessed on the warranty, in case of eviction; but such increase only as the parties could have had in contemplation at the time of the contract, will be taken into the account. *Id.*

10. Under the old Civil Code, the party evicted will not be allowed as damages a proportion of the price of sale, equal to the quantity of land from which he is evicted; but in assessing damages, when the sale is not cancelled, he is only to be reimbursed the value of the *evicted part*, according to its estimate at the time of eviction. *Melançon's heirs v. Robeaud's heirs*, 16 L. R. 151.

11. When the Court is unable from the evidence to assess the value of the *evicted premises*, it will remand the case for this purpose. *Id.*

12. The right of the party evicted to be paid the value of his improvements, rests on the broad principles of equity, that no man ought to enrich himself at the expense of another. *Pearce et al., v. Frantum*, 16 L. R. 414.

13. In regard to the right of being reimbursed for useful improvements and expenses put on the land, by which the property has been made more valuable to the owner, the law makes little or no distinction between a possessor in good or bad faith. But the sum to be repaid can in no case exceed the increased value of the property. *Pearce et al., v. Frantum*, 16 L. R. 423.

14. The son may become the owner of his father's improvements on land from which he is evicted, after his purchase, and is considered in the same light, in respect to his right to be paid for valuable improvements, as his father and previous possessor. This right to be paid for usual improvements is a real right, and the party evicted may retain possession until he is remunerated. *Id.*

15. The *fear* of eviction or being disquieted in possession of real property, is no good reason to delay the payment of the price. *Rogers v. Davis*, 18 L. R. 50.

16. If the party knew of the incumbrance before he purchased, it is doubtful if he can even demand security when he fears eyiction. *Id.*

EVICTIION OR DISTURBANCE.

1. The purchaser who has paid before the *disturbance* of his possession, cannot demand restitution of the price, or security under article 2538 of the Code; and the same rule applies to *such portion* as happens to be paid at the time of the disturbance. *Wallace & Co. v. Harty & Jones*, 17 L. R. 25.

2. So where suit is brought on one of several notes given for the same object, the defendants can only require security for the amount of the note sued on, in case of disturbance of possession or title. *Id.*

3. Security against the danger of eviction will be required when the title is not complete, although the lapse of time renders the probability of a disturbance somewhat remote. *Hardy, superior of Convent of Sacré Cœur, v. Landry's heirs*, 17 L. R. 191.

4. When seeurity is given against a disturbance or eviction, the vendor may proceed with his executory process for the *price* due on the sale. *Id.*

EVICTIION AND WARRANTY.

1. Where the purchaser is actually disturbed and in danger of

eviction of the thing sold, he may require security, before payment of the price can be demanded; but being in possession and enjoyment of the property, he must pay interest, or consign and deposit the price. *Ball et al. v. Le Breton et al.*, 19 L. R. 147.

2. The creditors of an estate are not bound to give security to the purchaser, before coming on him for claims due by it, on the ground that he is in danger of eviction. The right to call on a party to give security, implies a warranty against eviction. *Keller & Co.'s syndic v. Holliday et al.*, 19 L. R. 154.

3. The Roman law in laying down a general rule on the subject of warranty, provides that the purchaser must be indemnified to the extent of *the interest* he had in not being evicted; on this, there are some restrictions. *Edwards et al., f. p. c. v. Martin's heirs et al.*, 19 L. R. 284.

4. In regard to agreements having for their object certain quantity or amount, as in sales, leases, &c., the damages were not to exceed the value of the subject matter of the contract. *Id.*

5. A debtor engaging to pay damages for the non-payment of his obligation, is presumed to intend only the highest damages within the contemplation of the parties at the time of the contract; and if they are such as could not have been foreseen they must be reduced to a reasonable sum. *Id.*

6. The principles of the Roman law, which never had the force of positive law in this country, but which are founded in equity and reason will be adopted as rules regulating the indemnity to which a party is liable on his warranty. *Id.*

7. So it is impossible that parties ever contemplated that the damages in case of eviction should be larger than the value of the subject matter of the contract. *Id.*

8. So where the vendee of a female slave, purchased in 1802, was evicted, and the vendor refunded the price, is afterwards evicted of her encrease or children, the vendor is only bound for damages to the amount of the value or original price of said slave; and not the value of the young slaves, born of her after the sale, although much greater. *Id.*

9. A warrantor in case of eviction of the purchaser does not owe interest in the same manner as the purchaser who withholds the price of a thing, which produces fruits. *Melançon's heirs v. Robichaud's heir*, 19 L. R. 357.

10. The warrantor who is not in possession of the property is only bound among other obligations to reimburse the purchase money, or a proportion of it; and he owes interest after he is put in *morâ*, or from judicial demand; or if the debt is unliquidated, only from the rendition of judgment. *Id.*

11. Fees which parties have to pay to their counsel for asserting their rights in Courts of Justice, have never been, nor can they considered as costs, chargeable to the party cast. It is only taxed costs, which a warrantor is bound to reimburse to his vendee. *Id.*

12. Where a third person is interposed and sued as a trespasser, and disturbing the plaintiffs in their possession and title to land, and the vendors of the plaintiffs are called in warranty, they will be discharged and released when it is shown the action against the immediate defendant is simulated, or when the suit fails or is not prosecuted as to him. *Parrott et al. v. Edwards et al.*, 19 L. R. 366,

EVIDENCE.

1. It is necessary to make proof of the genuineness of an act of settlement between co-heirs, when it is offered as evidence of a sale or exchange, and also of the capacity of the heirs who are parties to it, before evidence of possession under it can be received, *Guerin et al. v. Bagneries*, 13 L. R. 14.

2. Evidence of the signatures to the private act of settlement among the co-heirs and their capacity, was improperly refused by the Court; because, until its genuineness was first shown, its validity and effect could not be examined. *Id.*

3. Heirs claiming a slave by inheritance, and under an act of settlement among the co-heirs, should be permitted to offer evidence, showing that the slave made part of the inheritance under the will of a deceased ancestor. *Id.*

4. The record of a suit between others, not only proves *rem ipsam*, to wit, that such judgment was recovered, but also a sale of certain goods mentioned in it; but it does not prove that these goods were purchased by the defendant as the consideration of the note sued on, and sold as the property of his vendor. *Morgan v. Yarborough*, 13 R. R. 74.

5. A bill of goods purchased by the defendant, is not evidence in a suit between him and the transferee of the note alleged to have been given for the price of them. *Id.*

6. If some parts of the evidence offered in a case are irrelevant, it affords no good ground to reject the whole. The objectionable parts, only should be disregarded. *Labret v. Belzons*, 13 L. R. 93.

7. Irrelevant testimony will be disregarded in this Court, but furnishes no ground for remanding the case. *Id.*

8. It is too general an objection, to state in a bill of exceptions, that evidence is inadmissible; the grounds should be stated. *Id.*

9. Parole evidence will not be admitted to show the usual rate of interest of any particular place in this State. It is either legal or conventional, and the latter must be express, and in writing. *Poydras v. Delamare et al.*, 13 L. R. 98.

10. Heirship may be established by parole evidence. *Hosea's Widow and heirs v. Miles*, 13 L. R. 107.

11. Parole evidence may be received to prove a verbal agree-

ment in regard to the occupation and repair of certain buildings although there be a written lease, if the agreement relates to a separate matter not contained in the lease. *Kenyon v. Berghel*, f. w. c. 13 L. R. 133.

12. Parole evidence will be disregarded in construing a written lease; but may be received in proof of a contract posterior to the lease. *Id.*

13. Parole evidence will be admitted to prove the handwriting of a subscribing witness to a written instrument, after every diligence has been used in vain to find him out, even without showing that he is dead, or resides out of the State. *Thompson v. Wilson's executors*, 13 L. R. 138.

14. Parole evidence will not be admitted to prove a written contract, but it may be received in proof of acts done by the parties, in execution of a written contract. *Amory et al. v. Black*, 13 L. R. 264.

15. The record and judgment of a suit between other persons and the plaintiff, are not admissible in evidence, except to show that such judgment was rendered; but the parole evidence on which it was obtained cannot, because it forms part of the record, be received as proof in another suit. *Baptiste, f. w. c. v. Soulié*, f. w. c. 13 L. R. 268.

16. The certificate of the Governor, that a Justice of the Peace before whom certain testimony was taken on commission, was commissioned as such at the time, is insufficient to authenticate the evidence, or a document which the Governor never saw and was ignorant of its existence. *Edmondson v. Mississippi and Alabama Rail Road Company*, 13 L. R. 282.

17. Parole evidence is admissible to prove a boundary line, recognized by the parties in support of a plea of prescription; with this limitation it goes merely to prove a fact connected with the actual possession of the party. *Blanc v. Duplessis*, f. m. c. 13 L. R. 334.

18. The attestation of the Governor under the great seal of the State, is the best evidence of a Justice of the Peace's capacity, next to his commission; and where proof of his signature is not required, or is admitted, the Governor's certificate, although not annexed to the return of the commission, is full evidence of his official capacity. *Thatcher v. Goff et al.*, 13 L. R. 360.

19. The certificate of the Recorder of Mortgages is *prima facie* evidence of the matters it contains. It devolves on the adverse party to show informalities, or that the renunciations or raising of the mortgages mentioned in the certificate are irregular. *Cannon v. Labarre*, 13 L. R. 399.

20. Parole evidence will not be received [to show that on diligent examination of the records of the parish, no act of raising certain mortgages could be found. It is not the best evidence. *Id.*

21. An auctioneer's certificate is admissible in evidence, even

when it shows the sale of certain property was ordered by a different person than is alleged in the pleadings, when he is shown to have been the agent. *Oxnard v. Locke et al.*, 13 L. R. 447.

22. After the death of the auctioneer, parole proof is the best evidence of the correctness of the entries in his record book and which the nature of the case admits. *Oxnard v. Locke et al.*, 13 L. R. 447.

23. A certificate of the collector of the customs made up from the import books of his office, stating that certain custom-house bonds were paid, is not admissible in evidence, when the provisions of the 2249th article of the Louisiana Code are not complied with by first proving the loss of the original, &c. *Johnston's heirs v. Cox's syndic*, 13 L. R. 536.

24. A duly certified copy of a sheriff's or city marshal's deed, made by the clerk of the Court in whose office the sale or deed of conveyance is recorded, will be received in evidence, in the same manner, and have the same effect as a duly certified copy of an authentic act. *Bailly & Son, f. p. c. v. Percy f. w. c.*, 14 L. R. 14.

25. Where the sheriff's deed only conveys all the right, title and interest of the defendant in execution, it is necessary to inquire what these rights, &c., were and to show that they were superior in dignity to the title of the adverse party, to enable the plaintiff to recover in a petitory action. *Id.*

26. Where fraud is charged, direct and positive evidence is seldom to be obtained. Circumstantial evidence is commonly all that can be had, and every circumstance becomes material to ferret out the fraud. *Cécile, f. w. c. v. St. Denis, f. w. c.*, 14 L. R. 184.

27. An order discontinuing a suit, may be used as evidence of this fact, as soon as it is entered on the minutes. It does not require the signature of the judge. *Morgan v. Whiteside's curator*, 14 L. R. 277.

28. The testimony of one witness corroborated by a mortgage, will be deemed sufficient to prove an open account over five hundred dollars, when it appears the mortgage was given to secure payment of all liabilities the plaintiffs were to come under for the defendant, and that the account embraced these objects. *Allain & Tremoulet v. Lazarus*, 14 L. R. 327.

29. Where the plaintiff sues to recover the value of work and labor done for the defendant, according to a bill of prices agreed on for part of it and for extra work, he will be allowed to produce evidence of the value of all the work performed. *Collings v. Hamilton*, 14 L. R. 339.

30. In an action on a special agreement for the price of work, or services rendered, the party may introduce evidence of the value of the work also. *Id.*

31. In an action for the return of the price on account of redhibitory defects in a slave, although the demand exceeds five hundred dollars, it may be proved by a single witness, when the demand

grows out of a contract evidenced by a notarial act. *Armor v. Huie*, 14 L. R. 346.

32. In an action to render the captain and owners of a steam-boat liable in damages for the value of sundry bags of corn shipped on board and delivered in a damaged state, evidence will not be received to show that the corn was purchased from the captain, in order to make him liable as seller. *Wilcox et al. v. Halderman et al.*, 14 L. R. 357.

33. In an action for slander, for calling the plaintiff a *thief*, &c., the defendant cannot offer the declaration of the plaintiff's father in evidence, reproaching the son with having committed a crime. *Quatreveaux v. Caboche*, 14 L. R. 365.

34. The declarations of the father, reproaching his son with misconduct, cannot be given in evidence against him in an action against a third person for slander. Nothing the father may have said can assist the defendant in establishing his charge. It is hear-say evidence; and the father could not be heard if he were offered as a witness. *Id.*

35. A receipt given by the person to whom a note was endorsed for collection, is admissible in evidence to show the nature of the endorsement, and that the plaintiff did not part with his interest in the note. *Waring v. Crawford*, 14 L. R. 376.

36. Where the absence of a witness is not accounted for, and he is not dead, a note of his testimony, not signed, is inadmissible in evidence. *Lessassier v. Dashiell*, 14 L. R. 467.

37. A document signed by L.... for B. Z. C. register of the land office, is inadmissible in evidence. Nothing shows that the register may act by proxy, or deputy; or that he delegated his powers to another to affix his signature. *Id.*

38. The defendant under an averment to rescind the sale to him by the plaintiff, cannot offer outstanding titles in others in evidence, when he is in possession. If he was in danger of eviction, the most he could do would be to withhold the price until security was given. *Id.*

39. Where the presumptions arising from the whole evidence, which leaves the case doubtful, preponderate in favor of the defendant, and the district judge, who tried the case, gives judgment in his favor, it will not be disturbed. *Meyers et al. v. Guesnard*, 14 L. R. 518.

40. So where a vessel was apparently abandoned by the surviving partner, and taken into possession by the original owner, who paid the charges on her, and held the notes of the purchasers for half the price, but had offered to rescind the sale, and the question of acceding to this offer left doubtful: *held*, that after the lapse of ten months, the purchaser will not be allowed to recover her back. *Id.*

41. The record is the best evidence to show that certain persons were parties to particular proceedings had in the probate Court,

and lies admissible for such purpose. *Williams v. Duer*, 14 L. R. 523.

42. Evidence of the repeated acknowledgments of the maker of a note that he would pay it, is admissible to prove its execution, when the subscribing witness is incompetent to testify, from his relationship to one of the parties. *Lopez's widow and heirs v. Berghel, f. w. c.*, 15 L. R. 42.

43. But where the defendant expressly alleges his signature to the note sued on, *to be forged*, evidence of his acknowledgment will not be admitted, under article 325 of the Code of Practice. *Id.*

44. The testimony of a deceased witness taken in writing on a former trial, is admissible in a subsequent trial. *Id.*

45. The writ of seizure or execution, and the officer's return thereon, may be given in evidence without the judgment, when that appears in the record, although introduced for another purpose. *Bissell et ux v. Erwin's heirs*, 15 L. R. 94.

46. The rejection of irrelevant evidence, which if admitted could not have influenced the decision in the case, cannot be complained of. *Id.*

47. Evidence of the acts or acknowledgments of a nominal party to a suit, touching a modification or new promises in relation to the original contract or transaction in question, will not be admitted. *Id.*

48. Payment to a Bank, like that to an individual, may be proved by parole evidence. *Millaudon v. Colla*, 15 L. R. 213.

49. Parole evidence cannot be received to prove in substance that a sale of a slave had been rescinded, or that the former vendor resumed possession as owner. *Emmerling v. Beebe et al.* 15 L. R. 251.

50. In an action by the owner of a slave for his hire and detention, a receipt of a third person, to show that he had released the defendants from the cause of action set forth by plaintiff, is inadmissible in evidence, as an attempt to prove title to the slave by incompetent testimony. *Id.*

51. Where the plea of forgery is put in, supported by the oath of the party, it requires much stronger evidence to authorize a recovery, than in the ordinary case of a general denial. *Robinson v. Arnet*, 15 L. R. 262.

52. So where the defendant expressly averred on oath, that his signature to the note sued on was a forgery, proof by witnesses who did not see him sign the note, but who only express their belief of its genuineness, from its similarity to signatures which *they had seen*, is insufficient to support the verdict of the jury. *Id.*

53. Parole evidence was properly rejected, of the husband's consent to lose three per cent per month on a note due to, and the sole property of his wife. *Defau et ux v. Pelane*, 15 L. R. 273.

54. Parole evidence is admissible to show that the description of a lot, in an act of sale, was made through error and accident,

and that the lot actually sold, was different from that described in the deed. *Palangue v. Guesnon, f. w. c.*, 15 L. R. 311.

55. Where payment of the second, instead of the *first* note is made in error, the mistake may be proved by witnesses, and the error corrected, without affecting the liability of any of the parties to the note. *Union Bank v. Slidell*, 15 L. R. 314.

56. No evidence can be received in the Supreme Court, that a judgment by consent was entered up, differently from the consent and agreement between the parties. *Brand v. Jones*, 15 L. R. 449.

57. Evidence of demand, and the right to claim interest, results from the protest and act of sale, when the price is for immoveable property. *Barker to use of Atchafalaya Bank v. Banks et al.*, 15 L. R. 453.

58. The Court cannot receive as proper evidence, any document as fact which the judge *a quo* states in his written opinion and judgment, to have been proven. It must appear by proof in the record, independently of his opinion or statement. *Childress v. Allin et al.*, 15 L. R. 500.

59. So where the judgment of a Parish Court is offered in evidence in the District Court, and is omitted to be copied into the record, and attested by the clerk or officer of the Court, but is only embodied in the judge's opinion, it is insufficient, and cannot be used as evidence on the appeal. *Id.*

60. Parole evidence is good to prove facts and circumstances of possession, at a time when the plaintiff's title was unknown, and when the parties could not be suspected of making evidence for themselves. *Dewall v. Chopin et al.*, 15 L. R. 566.

61. It is historically known that the Spanish government never contested the validity of grants made to the French officers, before the Spaniards took possession of the colony of Louisiana in 1769. *Id.*

62. Parole evidence is inadmissible to show that all the formalities of a nuncupative will by authentic act, have been fulfilled. It must make full proof on its face. *Leblanc v. Baras's heirs*, 16 L. R. 80.

63. Parole evidence cannot be received, to show that certain improvements, for which the note sued on was given, had not been made as expressed in a deed or retransfer of the property from the plaintiff to the defendant. *Cook v. Parkarson*, 16 L. R. 129.

64. So, where an act of retransfer of property, expressly stated that the sum of five hundred dollars was to be paid in consideration of the rescission of the sale, no parole evidence can be received to contradict or show that this consideration did not exist. *Id.*

65. Parties have a right to bring in and offer their evidence in the order they choose, and it should not be rejected because that first offered does not prove enough. *Maurin v. Chambers & Williams*, 16 L. R. 207.

66. Where defendants sued on their notes, given for the price of

land, resist payment, they have a right even against an endorsee, who received the notes before due, to offer evidence of the consideration, and to show they are in danger of eviction, when they allege they have further evidence to offer, that the endorsee had knowledge of these facts. *Maurin v. Chambers & Williams*, 16 L. R. 207.

67. Case remanded to admit evidence of the consideration of the notes, and that the makers of them were in danger of eviction from the land for which the notes were given. *Maurin v. Chambers*, 16 L. R. 212.

68. In a petitory action for a tract of land, the sheriff's deed under which the plaintiff claims, when in due form, is admissible in evidence. *Metoyer v. Lurenaudière*, 16 L. R. 260.

69. It is not a valid objection to the admissibility of a sheriff's deed in evidence, that it appears from a record accompanying it, that the land was not duly advertised before sale, and that the irregularity is not cured by the monition law. The deed must be admitted, leaving its legal effects to the jury under the instructions of the Court. *Id.*

70. Evidence of the general opinion of the insolvency of a mortgagor in his neighborhood, to the knowledge of the mortgagees, receiving a mortgage in fraud of creditors, is a fact which may be shown to create the presumption of knowledge in the mortgagees. *Brander et al. v. Ferriday, Bennett & Co.*, 16 L. R. 296.

71. Presumptive evidence ought not to be rejected, because alone, it does not operate conviction. *Id.*

72. A party cannot offer all his evidence simultaneously, and should not be controlled, in the choice of that which he chooses to offer first. A party to the suit, who is interested, cannot be called as a witness. *Id.*

73. Where the bill and protest are produced in evidence, without objection, it will be deemed sufficient proof of the drawers signature, to authorize judgment against him, as endorser of his own bill. *Nott's executor's v. Beard*, 16 L. R. 308.

74. Parole evidence will not be received, to show that an executor continued to act as such, after the expiration of the year, for which he was appointed. *Brown's executor v. Williams et al.*, 16 L. R. 344.

75. Evidence should be admitted on the trial of an exception, that one of the defendants had not been served with a true and correct copy of the petition; and if it is refused, the case will be remanded, as to that defendant. *Lambetts & Thompson v. Dosson & Lovelass*, 16 L. R. 346.

76. Where the defendant denies that the note sued on was signed by him, or any one authorised to sign for him, proof of his acknowledgements or admissions, are admissible, to charge him as the maker of the note. *Montelius & Fuller v. Cloman & Harrell*, 16 L. R. 375.

77. But where the party expressly alleges that his signature has been forged, evidence of his acknowledgements or admissions that the signature was genuine, is *insufficient*. *Montelius & Fuller v. Cloman & Harrell*, 16 L. R. 375.

78. The defendant denied that the note was signed by himself, or the firm of which he is a member; and two witnesses testified that he admitted the note to be genuine, and that it was a partnership transaction; there was judgment against him on this evidence. *Id.*

79. Acts of sale, *sous seing privé*, and not being recorded in the parish where the property is situated, are inadmissible as evidence of title to immoveable property. *Brosnaham v. Turner*, 16 L. R. 433.

80. Where the clerk's certificate or note of the evidence, omits the protest and demand of payment, the Court cannot presume that a demand of payment was made, although evidence of it exists in the record, but does not appear to have been offered. *Legendre v. Woodrooff*, 16 L. R. 477.

81. A claim for overseer's wages, above five hundred dollars, not in writing, is fully proved, by the testimony of one witness and the corroborating circumstance of the defendant's written declaration, that he would and did discharge the overseer from his employment. *Nelson v. Botts*, 16 L. R. 596.

82. The certificates of the French officers under the colonial government of Louisiana, that the plaintiff's ancestor was in possession of a certain tract of land, under a purchase from the Indians, &c., is not legal evidence of title, and is inadmissible as evidence in a petitory action. *Rilleux's heirs v. Singletary*, 17 L. R. 88.

83. The officers of the French government could only certify such records or documents as were deposited in their departments; and such documents should be produced. If they certify of their personal knowledge, they should be sworn. *Id.*

84. The acknowledgement of masters of steamboats of the correctness of bills presented for supplies or other things furnished the boat, are binding on the owners. *Black v. Savory et al.*, 17 L. R. 85.

85. To let in evidence of payment, such payment must be specially pleaded. *Landry v. Baugnon*, 17 L. R. 82.

86. Where part of a letter is offered in evidence and objected to, if any part of it is used, the party must admit the whole of it in evidence. *Clifton v. Lapice*, 17 L. R. 152.

87. The marriage contract between the deceased spouse and the defendant, is admissible in evidence, although not specially set up in the pleadings, in a suit for the settlement of the community affairs and partition thereof. *Lawson et ux. v. Ripley*, 17 L. R. 238.

88. Parties are not to be controlled in the order or manner of introducing the different parts of the evidence of their case. *Perkins v. Nettles' administrator*, 17 L. R. 253.

89. So the plaintiff may first be allowed to produce in evidence the

proces-verbal of the sale under which he claims, before showing that he has complied with the terms of said sale. *Nettles' administrator*, 17 L. R. 253.

90. Objections that a private act of transfer of a judgment, to the plaintiff's attorney in fact, has no date against third persons, and that there is a discrepancy in the name of the transferee, go to the effect and not to its admissibility in evidence; especially when the variance is explained. *Randall v. Bank of Louisiana*, 17 L. R. 273.

91. A recital in a deed or act of mortgage cannot produce any effect to the prejudice of a person not a party to it, and who does not claim under; and such recital is not evidence against a stranger to the second deed. *Id.*

92. Parole evidence is admissible to prove agency, and that the agent was employed to make demand on the adverse party, and that it was made in writing. *Laville v. Rightor*, 17 L. R. 303.

93. The signatures to a sheriff's bond executed and acknowledged before the Parish Judge need not be proved to admit it in evidence. *Police Jury of Plaquemine v. Scherburne et al.*, 17 L. R. 342.

94. In a suit on the sheriff's bond to recover from him and his securities, the balance of the parish taxes due, it is not required to put the parties in default; not even to recover the penalty. *Id.*

95. The 1042 article of the Code of Practice directs the testimony of witnesses in causes tried before the Court of Probates to be taken down in writing by the judge and annexed to the record; also a list of the documents filed by the parties, that they may be read on the appeal; and when this is not done, the case will be remanded at the costs of the appellee. *Desorme's heirs v. Desorme's syndic*, 17 L. R. 111.

96. In an action for damages to plaintiff's works and land, parole evidence is admissible to prove possession and acts of ownership of the premises. *Barrataria and Lafourche Canal Co. v. Field et al.*, 17 L. R. 421.

97. Evidence is admissible which is pertinent to the issue, going to show the extent of the injury complained of, and the cause from which it proceeds. *Id.*

98. A witness will not be allowed to be interrogated respecting the ownership of a tract of land, when an examination of the written title would shown it. *Id.*

99. The declaration of the defendant's husband, separated in property but acting as their agent, made in relation to the management of her levees is inadmissible in evidence against her, in an action for damages, in neglecting to keep them up. *Id.*

100. The record of a suit in admiralty will be received in evidence to show the fact of insolvency of an individual, in a suit in which he is no party, when it is only required to prove *res ipsas*;

and to show how certain funds were distributed. *Gillett v. Landis et al.*, 17 L. R. 470.

101. Evidence will not be admitted on a simple allegation that the plaintiff is not the owner of the instrument sued on. The defendant must aver that he has a good defence against the real owner; otherwise whether the plaintiff is owner or not, cannot avail him. *Peyroux et al v. Davis*, 17 L. R. 479.

102. Parole evidence of the law of a State is admissible, where it appears the common law only prevails. It is only when the evidence discloses a statute sought to be proved, that a certified copy is the best evidence and must be produced. *Wetmore & Co. v. Merrifield*, 17 L. R. 513.

103. Proof of the signatures of the subscribing witnesses to an act *sous seing privé* by the testimony of a witness will suffice without their production. *Buel v. New-York Steamer et al.*, 17 L. R. 541.

104. An act of sale under private signature not recorded, is sufficient to prove, *ownership of a slave* when there is no adverse claim and to show the defendant's liability, for his loss. *Id.*

105. Evidence of a fact, happening in a different country from that of the *lex loci contractus*, must be tested by the rules of evidence in the State where the remedy is sought. *L. & T. F. Shewell v. Raguet*, 17 L. R. 457.

106. Parole evidence is admissible to show by the practice and laws of another State, it is not necessary to present a note for payment, at the place designated therein, in order to maintain an action against the maker. *Booraem v. Merrifield*, 17 L. R. 594.

107. It is only the written or statute laws of a State that cannot be proved by parole; a certified copy is the best evidence. *Id.*

108. The testimony of a witness not objected to will outweigh the statements of the defendant in his account so far as he charges the plaintiffs for the *amount* of his salary; but will be revived as evidence of the credits he allows for moneys received by him. *Whitney et al, v Lyon*, 18 L. R. 26.

109. Where an agreement bears intrinsic evidence that the consideration had passed at its date, no evidence touching an averment of failure of consideration will be received. *Heath v. Locke et al.*, 18 L. R. 68.

110. Copies of township maps are not admissible in evidence when better evidence can be procured. *Millaudon et al. v. Mc Donough*, 18 L. R. 102.

111. So copies from public documents must be certified by the proper officer who is the keeper of the original. The surveyor general and not the register has authority to certify township maps to make them legal evidence. *Id.*

112. Parole evidence is admissible to prove usury. This plea would seldom be available if required to be proved by a counter-

letter or other written evidence. *Roasenda v. Zabriske f. m. c.*, 18 L. R. 346.

113. Parole evidence is inadmissible to prove title to slaves, but a witness may be received to prove that the defendant admitted that he had received and held certain slaves as the agent of the plaintiff. *Penatta v. Borges, executor*, 18 L. R. 348.

114. The initials of a name, or the name of a person at full length marked on bales of cotton, is strong evidence of ownership. *Lee & Hardy v. Palmer et al.*, 18 L. R. 405.

115. The testimony of two witnesses to the declaration of the deceased father, that he owed his daughter (*the plaintiff*) \$500, was received as evidence of the debt, although there was an attempt to discredit the testimony. *Rouzan v. Rouzan's curator*, 18 L. R. 425.

116. Parole evidence is inadmissible to prove any thing that was said or understood inconsistent with a written act; or any contract between the last purchasers and their immediate vendor, against the first vendor who was no privy to such contract. *Arnous v. Davern et al.*, 18 L. R. 42.

117. The authority of a clerk to sign the name of a mercantile firm to a letter of credit, addressed to a particular person, when denied, may be shown by circumstantial evidence, when there is no direct proof. *Moseley v. Keys & Roberts*, 18 L. R. 46.

118. An account for boarding and expenses of last sickness, which depends on inspection and proof, the judgment of the Court *a qua*, in which the witnesses appeared and testified, will have great weight. *Smith v. Dickinson's executor*, 18 L. R. 507.

119. Heirship may be proved by parole evidence, when it does not appear, or is not shown, there was a register of marriages, births and deaths in existence. The latter will not be presumed, as it must be positively proved, that such register does exist. *Guerin's heirs v. Bagueries*, 18 L. R. 590.

120. Parole evidence will be received to identify a slave which was inherited by the plaintiff's mother from her father's estate, and to show her possession of said slave as part of the inheritance. *Id.*

121. So parole evidence is admissible to identify property of a succession, accepted by an heir after having shown his right to inherit; or to identify slaves born on a plantation where the owner possesses by no written title. *Id.*

122. Proposals for a compromise or conversations about it are not generally admissible in evidence; but if any facts or distinct liability is admitted, evidence of it may be given, allowing the party the benefit of all the propositions or conversations which took place. *Agricultural Bank of Mississippi v. barque Jane, &c.*, 19 L. R. 1.

123. An agreement proved by the positive testimony of one witness supported by many strong corroborating circumstances, will

control the price of slaves as agreed on, against the price they were subsequently sold for at sheriff's sale. *Flower v. Millaudon*, 19 L. R. 185.

124. Evidence which is inadmissible to prove title, may be received to show possession by known marks and boundaries, which is good to sustain the plea of prescription. *Broadway's heirs v. Pool*, 19 L. R. 258.

125. A witness testifying to the extra judicial confessions, verbally made, of a deceased person, is the weakest of all testimony; as it cannot be contradicted, or the witness convicted of perjury if he swear falsely. *Gillispie v. Day*, 19 L. R. 263.

126. So proof by one witness to a single confession of an aggregate amount above 500 dollars is insufficient without some corroborating circumstance; although if the witness testified of his own knowledge to two successive loans, or sums, amounting together to more than \$500, the evidence might be received as sufficient. *Id.*

127. Positive testimony cannot be destroyed by the negative proof of witnesses who testified that they did not see a certain slave on board defendant's steamboat. *Slatter v. Holton*, 19 L. R. 39.

128. Ancient plans of a city are admissible in evidence to prove the boundaries of lots sold in reference thereto, and the direction of streets so far as they may extend, although not including *the locus in quo*; and especially when one of the parties claim under those who caused the plans to be made. *Carrollton Rail-Road Co. v. Municipality No. 2*, 19 L. R. 62.

129. The acceptance of accounts by the party to whom rendered is *prima facie* evidence of their correctness, and it is for him to show errors. The burden of proof is on him. *Flower v. Millaudon*, 19 L. R. 195.

130. Testimony contained in a deposition must be disregarded which goes to show any thing contrary or explanatory of a judgment between the parties; but may be proper to prove that one of the parties was in possession of a separate estate. *Skipwith v. his creditors*, 19 L. R. 198.

131. The record of a suit and judgment is admissible in evidence to show it was rendered against a party who had surrendered certain slaves to be sold, although it might be insufficient *per se* to prove she had title to them. *Id.*

132. Acts or deeds under private signature acknowledged before the mayor of a city, are inadmissible in evidence, when it is not shown he had authority to take the acknowledgements of witnesses to such acts or deeds. *Id.*

133. The record of a suit, pending in the Supreme Court of another State, is inadmissible in evidence, when it is irrelevant and tends to controvert a judgment between the same parties in this State. *Id.*

134. This Court cannot receive as evidence in any case, any

thing which the judge *a quo* states in his opinion to have been proven. An admission of material facts cannot be proved by any mention in the judge's opinion, that such admissions were made. *Broussard v. Broussard*, 19 L. R. 355.

135. Evidence not pertinent to the issue may be admitted and the effect of it be afterwards considered. *Davis v. Police Jury of Concordia*, 19 L. R. 533.

136. In a claim for right of ferry, evidence is admissible to show, the land purchased was not worth the price paid, without the right of ferry was attached to it. The effect of it should be considered with other circumstances. *Id.*

137. Where the right of ferry depends on a condition, evidence should be received to show the condition has not been performed. *Id.*

138. The certificate of the commandant, stating that a certain road was made as required by the condition of a grant of the perpetual right of ferry, is not conclusive, but only *prima facie* evidence of the fact which may be contradicted. *Id.*

139. Evidence is admissible to show that a ferry, which is claimed under an inclusive grant from the Spanish government, was in fact kept under the control and supervision of the police jury. *Id.*

140. Instruments of writing, such as grants, certificates, &c., are admissible in evidence, without proof of their signatures. They are *prima facie* evidence; and may be contradicted by showing, that they were not acting in the capacity they purport. *Id.*

141. The transfer of a grant or privilege may be proved by comparison of handwriting, when the signature of the witness is shown to be genuine, and he is dead. *Id.*

142. The authority of a deputy clerk to issue an attachment, when denied, should be clearly established by evidence. *McKown v. Mathes*, 19 L. R. 542.

143. Conversations between the husband and wife out of the presence of the defendant, who was not privy to the sale or transaction to which they relate, are inadmissible in evidence. *Blanchard v. Castille*, 19 L. R. 362.

144. Threats and undue influence of the husband, to induce his wife to sign an act of sale of her paraphernal property to B, even if sufficient to annul it as between them, cannot affect the rights or be given in evidence against C, a *bona fide* purchaser from B. *Id.*

145. A third person who did not sign a notarial act of sale, although it expresses on its face, that the price was paid by the vendee *in cash*, may show by parole evidence, that in fact it was paid partly in cash, which he advanced, and by his note for balance. *Benoit v. Broussard*, 19 L. R. 387.

146. Where the testimony of the witnesses is contradictory and the evidence nearly balanced, the opinion of the judge *a quo* will have great weight. *Id.*

147. Parole evidence is admissible in contradiction to the written

statement of the defendant, intended as a settlement between the parties, and also of title to a slave, under the pleadings alleging fraud. *Brownson v. Fenwick*, 19 L. R. 431.

148. Evidence taken down at the instance of the plaintiff, cannot be stricken out, on the cross examination, on the ground that it contradicted or went to explain a written contract and was inadmissible. The motion to strike it out came too late; the objections should be stated when the testimony is offered. *Huey v. Drinkgrave*, 19 L. R. 482.

149. Parties are not to be controlled in the order in which they adduce their proof on the trial: so in the transfer of a note, the defendant may examine witnesses to prove the existence of equities between the original parties affecting the consideration, and afterwards to show by evidence that the plaintiff took the note with a full knowledge of thier existence. *Jones v. Young*, 19 L. R. 553.

150. The general rules of evidence established by the Louisiana Code must be considered as applicable to all contracts whatever. *Waters v. Petrovic & Blanchard*, 19 L. R. 584.

151. An agent entitled to a commission for his services, is not disqualified as a witness for his employer. So an attorney at law, though entitled to a commission on the amount recovered, will be a competent witness for the plaintiff. *Burke v. Brazeale and another*, 1 R. R. 73.

152. A corporation cannot offer its stockholders as witnesses, though the opposite party may; but when once admitted they may be cross-examined, and give evidence in favor as well as against their interest, on the points to which they were called to testify. *Hart v. The New-Orleans and Carrollton Rail Road Company*, 1 R. R. 178.

153. In a suit against a corporation the individual stockholders are not cited, but only those agents or officers whom the law designates as managers of its affairs; such stockholders do not occupy the position of actual defendants, who must be interrogated on facts and articles, but may be summoned by the opposite party as witnesses to testify against their interest. *Id.*

154. In a suit against the endorser of a note, where the name of the latter has been erased, the plaintiff must account for the circumstance, or the obligation will be considered as cancelled. The affidavit of the plaintiff will not be received to prove that such erasure was made through error or accident: it must be established by legal evidence, not by the declarations of the party who seeks to recover. *Slocomb and others v. Watkins*, 1 R. R. 214.

155. The father of one of the parties, is incompetent as a witness for him. *Leeds and another v. Caldwell and another*, 1 R. R. 256.

156. A third person for whom certain acticles were ordered, cannot be a witness for the defendant, in an action against the agent who ordered them. *Id.*

157. A statement by the witnesses in the depositions offered in

evidence, that they have been released from all responsibility by the party in whose favor their testimony is produced, is itself an effectual release, and renders the introduction of the original release unnecessary. *Bailey v. Stewart*, 1 R. R. 410.

158. The authorization required to enable a married woman to appeal from a judgment rendered against her, must be proved by other evidence than the allegations of the wife, or of her counsel. *Gorman v. Berghans*, 1 R. R. 468.

159. The provision of the Code of Practice requiring the testimony of witnesses before the Courts of Probates to be taken down in writing, does not give such testimony a higher character, than other parole evidence reduced to writing in the form of a deposition; and can never be used when the attendance of the witnesses can be procured. *Pinnell, tutor and another v. Scriber, administrator*, 1 R. R. 2.

160. Where, after the trial has commenced, a juror has been withdrawn, and a new one sworn by consent, either party, or the juror himself, has a right to require that the witnesses shall be examined *de novo*. It will not be sufficient that the evidence, which had been reduced to writing, be read to him. *Prentice v. Chewing*, 1 R. R. 71.

161. Where one of the parties to a suit is called upon to be sworn and examined on the trial, without any specific interrogatories having been previously propounded to him, he must be considered as called upon as any other witness, and be allowed to testify generally. Where the other party desires to confine his examination to certain facts, he must pursue the course pointed out by law for examinations on facts and articles. *Martin v. Wright*, 1 R. R. 299.

162. Clerks of courts cannot certify any thing done in the prosecution of a suit, otherwise than by a copy of the minutes or records unless specially authorised by law. *Taylor's administrators and another v. Jeffries' administrators*, 1 R. R. 1.

163. The want of a seal to the certificate of a notary, will be no objection to its admission in evidence. No law requires that a notary shall furnish himself with a seal. *Lambetts and another v. Caldwell and others*, 1 R. R. 61.

164. Under the act of the 14th February, 1821, the certificate of a notary will not be sufficient proof of notice of protest, unless attested by two witnesses. *Deblieux and another v. Bullard and another*, 1 R. R. 66.

165. A decree of the Court of Probates admitting certain persons as heirs, is *prima facie* evidence of their being so, though such a recognition will not preclude other heirs, or even debtors of the estate, from showing the contrary; but until this is done, the decree of the Court of Probates must be held sufficient evidence of heirship. *Glover and others v. Doty*, 1 R. R. 130.

166. Under the act of 28th February, 1837, the certificate of the

American Consul in any foreign country, is legal evidence of the attributes, official station and authority of any civil officer in such country, under the laws thereof. *Succession of Wedderburn*, 1 R. R. 263. *Succession of Farmer*, 1 R. R. 270. *Succession of Hinde*, 1 R. R. 271.

167. No proof will be required of the signatures to a bail bond, taken and attested officially by a Justice of the Peace. *The State v. Boisseau and others*, 1 R. R. 388.

168. Extracts from the inventory of an estate, or from the *procès-verbal* of the sales, when duly certified, are admissible in evidence, without producing copies of the originals. *Perkins v. Dickson, tutor*, 1 R. R. 413.

169. A survey of a portion of the public lands, under an order from the land office, approved by the surveyor general, is conclusive, unless it be shown that it deviates from the order. *Boatner v. Scott*, 1 R. R. 546.

170. A copy of a survey, certified by the register of a land-office of the United States to be a correct transcript of the original survey in his office, is admissible in evidence. The copy is properly certified by the officer having the custody of the original. *Id.*

171. A copy of the certificate of the commissioners for adjusting land claims in favor of a claimant, certified by the surveyor general, is inadmissible. It should be certified by the register of the land office. *Id.*

172. Where a judicial tribunal of another State, has acted finally on a case, the legal presumption is that every thing has been done according to law: and the judgment will be evidence between the parties. *Jordan v. Black*, 1 R. R. 575.

173. A record from a Court of another State, none of the judges of which, has the title of Presiding Judge, or Chairman, certified by all the judges, is a substantial compliance with the act of Congress, and will be received in evidence. *Id.*

174. Plaintiff having obtained judgment against defendant, for the same cause of action, in another State, offered the record in evidence. *Held*, that an instrument which formed part of the record, and which was used as evidence on the first trial, must be presumed to have been duly proved and cannot afterwards be objected to. *Id.*

175. An agreement, though for an amount exceeding five hundred dollars, may be proved by a single witness without any corroborating circumstances, where it is not sought to be enforced as a covenant, but merely to be proved as a fact. *Littell, tutrix, v. Marshall and others*, 1 R. R. 51.

176. Where the signature to a power of attorney was proved by a witness who was sworn, without objection, it will be too late to object on an appeal, that the subscribing witness should have been produced. *Cawthorn v. W. N. T. McDonald*, 1 R. R. 55.

177. The acknowledgment of delivery made by the vendor of certain slaves in the deed of sale, is sufficient against a naked possessor without title. *Id.*

178. Where a note is made payable at a future period, with interest from date if not punctually paid, such interest is in the nature of a penalty for not punctually performing the principal obligation, and the failure to do so must be strictly proved to entitle the plaintiff to recover the additional interest. Where such a note was payable at a particular place, proof that it was presented and demand of payment made at such place after it fell due, will not entitle the holder to recover the additional interest. *Glover and others v. Dolly*, 1 R. R. 130.

179. On an application for an order of seizure and sale by the holder of a note endorsed by the defendant, and secured by mortgage on property sold by the latter to a third person by whom the note was made but subsequently reconveyed, proof of the recording of the original act of sale will not be necessary as against the defendant, he being owner and possessor of the property and personally bound for the debt. *Duncan v. Elam*, 1 R. R. 135.

180. Possession of a negotiable instrument endorsed in blank is *prima facie* evidence of ownership, and yields only to proof to the contrary. *Dussin v. Charles and another*, 1 R. R. 195.

181. Art. 3361 of the Civil Code, so far as it requires proof of the failure of payment to entitle a party to an order of seizure and sale, is repealed by art. 63 of the Code of Practice where the hypothecated property is in the hands of the debtor, and the creditor has besides his hypothecary right, a title importing a confession of judgment, he may have the hypothecated property seized immediately, without any proof of failure of payment. Art. 63 of the Code of Practice dispenses with the necessity of putting the mortgagor *in morâ*, before obtaining an order of seizure and sale, if such necessity ever existed. *McDonough v. Fost*, 1 R. R. 295.

182. No other testimony is required to support an order of seizure and sale, than the authentic act containing the confession of judgment. *Id.*

183. Art. 1576 of the Civil Code, which provides that in the country it suffices for the validity of nuncupative testaments, under private signature, that they be passed in the presence of three witnesses, residing in the place where the testament is received, or of five witnesses residing out of the place, provided that a greater number cannot be procured, does not contemplate a physical or absolute impossibility. Reasonable diligence to procure the witnesses, is all that is required. *Maria and another v. Edwards, executor and another*, 1 R. R. 359.

184. An act of express ratification to be valid, must mention: *first*, the substance of the obligation; *second*, the motive; *third*, the intention to repair the vice or vices which exist. If there be several vices, mention of one only will not repair the others. *Walden v. Peters and another*, 1 R. R. 457. *Same v. Strong*, 1 R. R. 459.

185. The books of a Corporation are evidence of the acts and

proceedings of the body, and, with respect to the corporators, are public. They are common evidence and each individual having a legal interest in them, has a right to inspect, and to use them as evidence of his rights. But a *mandamus* will not be issued to compel the keeper of such books to allow an inspection, or the taking of copies, unless a clear right be shown, and some just and useful purpose is to be effected. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

186. An entry in the books of a partnership, made at the time of the transaction, will be conclusive between the parties, unless shown to be erroneous. The partners were the mutual agents of each other, and such an entry must be regarded as a account rendered of the transaction. *Armistead and another v. Spring*, 1 R. R. 567. *Jarvis and another v. Armistead and others*, 1 R. R. 567.

187. A party may be bound by what is contained in an act between third persons where it is proved that he had notice of it; and, as parole testimony is necessary and admissible to prove such notice, whatever took place at the time of notice, may, by the same kind of evidence, be proved as part of the *res gesta*. *Benton v. Roberts and another*, 1 R. R. 101.

188. A witness may be admitted to prove that the date of a bond offered in evidence was a clerical error, and to establish the real time of its execution. *Belot v. Donnavan*, 1 R. R. 257.

189. Where the consideration of a mortgage is not stated in the act, and the mortgagor pleads a failure of consideration, parole evidence is admissible to prove the nature of the consideration and its failure. *Falcon v. Boucherville*, 1 R. R. 337.

190. Parole evidence is admissible to prove the intention of the parties at the time of entering into a written contract. But it may be received to prove a subsequent agreement, to grant an authority not conceded in the original contract. *Ross v. O'Neil*, 1 R. R. 358.

191. Parole evidence is admissible to prove that slaves, purchased by a married woman, were paid for out of her paraphernal funds, though not so stated in the act of sale. Such evidence is not repugnant to the deed. *Terrell v. Cutrer, syndic*, 1 R. R. 367.

192. Parole evidence is admissible to prove what occurred at the time of a judicial sale, or subsequently, in relation to a compliance with the terms of the sale. *Perkins v. Dickson, tutor*, 1 R. R. 413.

193. Articles 2258, 2259 of the Civil Code relate exclusively to written obligations, which have been either lost or destroyed. They are in derogation of the general principles of evidence, and will not be extended to cases not clearly within their purview. *Slocomb and others v. Watkins*, 1 R. R. 214.

194. A recognition, by the principal, of a deed executed by an agent whose procuration has been lost or mislaid, renders the deed valid *ab initio*; and where it sets forth the tenor of the original conveyance, the production of the latter will be unnecessary. So,

where the act of recognition emanates from a public officer, the successor of the one, who, in his official character, was authorized to make the original deed. *Culliver v. Berge and another*, 1 R. R. 427.

195. In an action on a contract, the original of which has been lost, it will be sufficient to allege the loss, and to state its contents, in the petition; proof of the loss, need not be offered previous to trial. *Townsend and another v. Caldwell*, 1 R. R. 433.

196. Where an order by the Parish Judge, granting an injunction from the District Court, recites that it was made in the absence of the District Judge, such absence will be presumed. *Stanhrough v. Scott, sheriff and another*, 1 R. R. 43.

197. In an act executed before a notary by a party who signs it by his mark, it is not necessary that it should appear that it was read and explained to him. It will be presumed, if he did not read it himself, that it was read to him by the notary. *McDonough v. Fost*, 1 R. R. 295.

198. When a bond has been executed by filling up a printed form, interlineations made in consequence of want of space to contain all necessary writing, will be considered as sufficiently accounted for. *The State v. Boisseau and another*, 1 R. R. 388.

199. The demand required to be made of an administrator, curator or testamentary executor, before commencing suit against a succession, is in the nature of amicable demand, and need not be proved, unless specially denied. *Police Jury of St. Helena v. Flucker admintstrator*, 1 R. R. 389.

200. It will not be presumed that an act of one of the executive departments, was performed without the concurrence of the President; and his directions in the premises, or ratification of the act, need not be shown. In the performance of his constitutional duty to see that the laws are executed, the President acts generally through the executive departments; and the acts of these departments must be considered as his. *Culliver v. Berge and another*, 1 R. R. 427.

201. Under a policy of insurance, which provided that if there should be any false swearing on the part of the assured, he should forfeit all claims to the policy, a failure by the latter to sustain his affidavit, by direct evidence, to the amount claimed, will not be considered as proof of his having sworn falsely, and thereby forfeit the insurance. In open policies, it is often extremely difficult to prove the actual value of the goods lost; it suffices to show by testimony the great probability of the truth of the affidavit: and in weighing this testimony, the character of the assured, as well as the credibility of the witnesses, must be considered. *Marchesseau v. The Merchants, Insurance Company of New-Orleans*, 1 R. R. 438.

202. Where it is not certified that the record contains all the evidence adduced on the trial, and the judgment purports to have

to have been rendered on due proof of the plaintiffs' demand, it will be presumed that evidence was offered to satisfy the Court, though the record does not otherwise show that any was produced. *Fowler v. Smith and husband*, 1 R. R. 448.

203. Ordinary partners are not bound *in solido* for the debts of the partnership, nor can one partner bind the others unless authorized to do so, either specially, or by the articles of the partnership itself, or unless it be proved that the partnership was benefited by the transaction, and the burden of proof rests on the party who seeks to be paid. *Dumartrait, administrator and others v. Gay and another*, 1 R. R. 62.

204. Where the plaintiff sues as administratrix, and her capacity is denied, she must prove it, or be non-suited. *Segrest, administratrix v. Hood*, 1 R. R. 108.

205. On a rule to show cause why an order of arrest should not be dissolved, in a case in which property had been previously attached, proof of the insufficiency of the property attached will not be on the plaintiff, where its sufficiency was not made a ground of the rule to quash the arrest. *New-Orleans Canal and Banking Co. v. Comly*, 1 R. R. 231.

206. The plaintiff in a petitory action must make out his title before the defendant can be disturbed. *Carraby v. Lebreton, curator*, 1 R. R. 242. *Hart and others v. Foley*, 1 R. R. 378. *Winchester v. Cain and another*, 1 R. R. 421.

207. A letter of one of the parties cannot be used in evidence to prove only a particular fact, and the rest of its contents, though relating to the same subject, be excluded; the statements must be taken all together. *Stanbrough, administrator v. Garrett, administrator*, 1 R. R. 13.

208. An allegation by defendant, on a motion for a new trial, that a witness testified to admissions made by him in an unsuccessful attempt to compromise, will be disregarded, unless accompanied with an affidavit that he was ignorant of the circumstance at the time of the trial. *Burke v. Krazeale and another*, 1 R. R. 73.

209. A retiring partner will not be bound by any acknowledgments, in regard to goods delivered after the dissolution, made by his former partner. *Clarke v. Jones and another*, 1 R. R. 78.

210. An unauthorised admission made by an attorney in fact, will not bind his principal. *Halphen, tutrix v. Fulseher*, 1 R. R. 417.

211. A judicial avowal or admission by an ancestor is as binding on his heirs, as it was on himself. *Boatner v. Scott*, 1 R. R. 546.

212. An admission made in the course of judicial proceedings, cannot be retracted to the prejudice of the adverse party. *Id.*

213. An endorsement by the clerk of the Court of Probates on the petition of an administrator for the homologation of a tableau of distribution, that it was advertised on a certain day, is not sufficient proof of the publication of the advertisement required by

law. *Taylor's administrators and another v. Jeffries' administrators*, 1 R. R. 1.

214. Where in a suit against a land-holder for his proportion of the expense of work executed by the plaintiffs, under a contract with commissioners appointed by an ordinance of the police jury, the plaintiffs rely on an assumpsit of the defendant, proof of the appointment of the commissioners will not be required. *Mackin and others v. Rowly*, 1 R. R. 82.

215. Actual possession of part of a tract of land, with title to the whole, is possession of the whole; but the party alleging such possession must show fixed and certain boundaries to the tract, the whole of which he claims by establishing actual possession of a part, otherwise possession of a few acres might be extended to any number, according to the interest of the party. *Gillard and others v. Glenn and others*, 1 R. R. 159.

216. In a suit for freedom by a person of color, held as a slave in good faith and under a just title, proof that he had served as a seaman in a ship of war belonging to the United States for several years, that he had always passed for a free person, and that none other were ever received on such vessels, will not be sufficient; he must establish his freedom by positive proof. *Jackson v. Bridge's heirs*, 1 R. R. 172.

217. In an action for damage to plaintiff's carriage by an omnibus belonging to the defendants, it is not necessary that the plaintiff should prove a legal title in the defendants to the omnibus; *prima facie* evidence of title, such as public reputation, will be sufficient, and for this purpose, a witness may be asked, whether the defendants were not generally reputed to be its owners. It will be for the latter to show that they were not. *Hart v. New-Orleans and Carrollton Rail Road Co.*, 1 R. R. 178.

218. Where property has been attached, on an affidavit that the defendant had left the State with the intention of never returning, his subsequent return will not alone be sufficient to dissolve the writ, where circumstances render it probable that his original intention was not to return; otherwise, where nothing suspicious existed, or where an intention to return was proved. *New-Orleans Canal and Banking Co. v. Comly*, 1 R. R. 231.

219. The production of a receipt for a part of the rent, is a corroborating circumstance to establish a verbal lease for any amount, previously proved by the testimony of one witness. *Brandagee v. Fernandez and another*, 1 R. R. 260.

220. Under the general issue, the defendant may show any fact tending to prove that he is not indebted to the plaintiff, as alleged in the petition. *Bonnabel v. Bouligny, sheriff*, 1 R. R. 292.

221. An affidavit by a party, that the facts are true to the best of his knowledge and belief, is as positive in point of law, as if the words to the best of his knowledge and belief, had been omitted. *Jewell and others v. Jewell and others*, 1 R. R. 316.

222. An affidavit should be so positive, that the party may be convicted of perjury in case of his swearing falsely. *Jewell and others v. Jewell and others*, 1. R. R. 316.

223. A renunciation of prescription may be proved on the trial, though not alleged in the petition. Such an allegation is unnecessary, for the plaintiff cannot know that prescription will be pleaded in the answer. *Segond v. Landry*, 1 R. R. 335.

224. Waiver of prescription may be proved by one witness, where the amount of the obligation is under five hundred dollars. *Id.*

225. A married woman having the right to resume, at any moment, the administration of her paraphernal property, it is unnecessary to prove that she had the actual administration at the time that she expended a part, with her husband's consent, in the purchase of other property, that act itself being one of administration. *Terrell v. Cutrer, syndic*, 1 R. R. 367.

226. Where both parties claim under the same person neither can dispute his title. *Kemp and others v. Womack*, 1 R. R. 369.

227. Where the demand in the petition exceeds five hundred dollars, but the amount in dispute has been reduced below that sum, by pleas of prescription and *res judicata*, the testimony of a single witness, without corroborating circumstances, will suffice to establish the plaintiff's claim for such reduced amount. *Police Jury of St. Helena v. Fluker, administrator*, 1. R. R. 389.

228. Facts, appearing from interrogatories which a party had no right to propound, will not be noticed. *Laville v. Hebrard*, 1 R. R. 435.

229. To obtain a *mandamus*, the applicant must allege and prove the duty required to be performed, and that he has been injured, or apprehends injury, or that he has been deprived of some legal right. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

230. In an action by the syndic of the creditors of an insolvent, against a former syndic to recover a balance due to the estate, evidence is inadmissible to prove payments to the creditors not sanctioned by an order of Court. Such evidence, if admitted, would not be conclusive against the creditors, contradictorily with whom, the claims alleged to have been paid, must be proved, as well as their rank and privilege. *Rodriguez, syndic v. Dubertrand and another*, 1 R. R. 535.

231. On the trial of an exception to the petition, and during the argument of defendant's counsel, plaintiffs offered in evidence letters of tutorship and administration, which were excepted to as too late. The bill of exceptions did not expressly state whether the evidence had been closed. *Held*, that such an objection is a weak one; and that the bill of exceptions should have stated all the circumstances with particularity, to enable the Court to determine whether the evidence ought to have been excluded, on a ground

purely technical. Objection overruled. *Langfitt v. Clinton and Portland Rail Road Co.*, 2 R. R. 217.

232. An act of sale stipulated that the notes given for the price were to remain with the notary, until a mortgage existing on the property should be cancelled. Plaintiffs obtained an order of seizure and sale, without having produced any evidence of the cancelling of the mortgage. On an appeal by the defendant, and assignment of the want of evidence of the cancelling as error apparent on the face of the record, plaintiffs offered a certificate of the recorder of mortgages to show that the mortgage had been cancelled. *Held*, that the cancelling not having been alleged or proved in the inferior Court, no evidence could be offered to prove it on the appeal. *Petit v. Grandmont*, 2 R. R. 283.

233. A witness is incompetent on the score of interest only where he has a direct interest in the event of the suit, and is called to testify in support of that interest: or where the verdict and judgment, to obtain which his testimony is used, would be admissible evidence in his favor in another suit. *Debuys v. Connolly*, 2 R. R. 338.

234. One who had been offered as security on a twelve months' bond for the price of property sold under execution, and rejected by the sheriff as insufficient, will be a competent witness to prove his own solvency, on an opposition by the first purchaser, to the homologation under the monition law of 10th March 1834 of a second sale, made at the risk of the first purchaser, on the ground of the insufficiency of the security. He has no interest either in the event of the suit, or in the question. the bias which may result from being called on to testify to his own solvency, is not enough to exclude him. The interest which renders a witness incompetent, must be a pecuniary one; that which results from his feelings or his wishes, goes to his credibility only. Nor is it sufficient to exclude a witness offered under such circumstances, that he was the endorser of the note upon which the original suit was instituted; his testimony cannot in any way affect his liability as such. *Id.*

235. Persons claiming a part of the estate of an insolvent, as heirs of a deceased wife, on account of the community of gains, must establish their right to recover by adequate evidence. It will not be sufficient to render it probable. *Wilcox v. his creditors*, 2 R. R. 27.

236. A mortgagee who seeks to enforce his mortgage against third persons, must prove that it has been duly recorded. *Cassidy v. his creditors*, 2 R. R. 47.

237. Where a bill of exchange is assignable only by endorsement, one who obtains possession of it by a forged endorsement acquires no interest, though ignorant of the forgery; and the original holder may recover of the acceptors, though the latter have paid the amount of the bill to the person in possession under such endorsement, unless it be shown that such payment was made

through the fault of the original holder; but the fault must be shown, and the burden of proof is upon the party who justifies the payment. *Jackson v. Commercial Bank of New-Orleans*, 2 R. R. 128.

238. Where the defendant in a petitory action has established the value of the improvements made by him on the premises, and plaintiff, under article 500 of the Civil Code, which gives to the owner of the soil on which plantations or constructions have been made by a third person, the election either to reimburse the value of the materials and the price of workmanship, or to pay a sum equal to the enhanced value of the soil, seeks to avail himself of the privilege by paying the enhanced value, he must show the amount of such enhanced value. *Rivas v. Hunstock*, 2 R. R. 187.

239. The holder of a negotiable instrument is not required to prove the consideration which he gave for it, unless specially called upon by the answer so to do. *Davidson v. Keyes*, 2 R. R. 254.

246. Where a remunerative donation exceeds the disposable portion, the donee or legatee is bound to prove the value of his services. If proved to be equal to or greater than the bequest, no reduction can be made; otherwise, it must be reduced to the estimated value of the services C. C. 1500, 1512. But where such donation does not exceed the disposable portion, the declaration of the testator, as to the services and their value, will be conclusive on the heirs, and no proof will be required from the legatee. In the latter case, the remunerative disposition must be viewed as an ordinary bequest, and the services as the motive or inducement for making it. *Succession of Fox*, 2 R. R. 202.

241. One who avers that a remunerative legacy exceeds the disposable portion, must show it, until this be established, the donee or legatee is not bound to prove the value of his services. *Id.*

242. The demand to be made on a note payable at a particular place, cannot be assimilated to the amicable demand required by the Code of Practice, the want of the latter must be pleaded to put the plaintiff on the proof of it, and a failure to establish it does not prevent his obtaining judgment, but only subjects him to the payment of the costs incurred before the appearance of the defendant, the former must be alleged and proved, or the plaintiff cannot recover. *Stillwell v. Bobb*, 2 R. R. 327.

243. Fraud will not be presumed. He who alleges it must establish it clearly. *Cassidy v. his creditors*, 2 R. R. 47.

244. Defendant having purchased a lot of negroes, in other respects sound, on placing them in the railway cars to be transported to his plantation, a distance of sixteen miles, discovered in one of them the first symptoms of the measles. The one thus affected was not separated from the rest, either in the cars or on his plantation, and no physician was sent for until four days had elapsed, when another was found ill of the same disease. Both of these, and two others, died of the disease. In an action by the vendor for the

price : *held*, that the measles is not an incurable malady ; that defendant, by neglecting to separate the sick girl from the other slaves after notice of the disease and by omitting to call in medical aid at once, failed to act as a man of ordinary prudence would have done ; and that the presumption, created by section 3 of the act of 2d January, 1834, as to slaves who have been less than eight months in the State, that any redhibitory malady which displays itself within fifteen days after the sale, existed on the day thereof, does not apply to such a case. *Lyons v. Kenner*, 2 R. R. 50.

245. A notarial act will be presumed to be correct, unless the evidence leaves no reasonable doubt of the contrary. *DeBlanc v. Martin*, 2 R. R. 82.

246. After the lapse of twenty years, the legal presumption is in favour of the acts of sheriffs. *Drouet v. Rice*, 2 R. R. 374.

247. Where a vessel is lost in consequence of some of the perils insured against, the presumption is in favor of her seaworthiness ; and it is incumbent on the underwriters to show that this warranty has not been complied with. But where a loss occurs, which cannot be ascribed to stress of weather or accident, the presumption will be that the vessel was not seaworthy ; and the burden of proof must be on the insured. *Dupeyre v. Western Marine and Fire Insurance Co.*, 2 R. R. 457.

248. In the absence of all evidence, the laws of another State will be presumed to be the same as our own. But where the law is shown to have been the same, the repeal of the law in this State, will not authorize the assumption that it has also been repealed in the other ; such repeal, if it exist, must be proved by the party interested to establish it. *Exparte Lafonta*, 2 R. R. 495.

249. A promise to accept a bill, if the amount exceed five hundred dollars, must be proved by at least one witness, and by other corroborating circumstances. These circumstances must be established *Aliunde*, and not by the witness himself. *Robbins v. Lambeth*, 2 R. R. 304.

250. Where a party wishes to obtain an execution on a judgment rendered in another State, he must produce a record attested in the mode pointed out in that part of the Code of Practice regulating executory process. A transcript certified by the clerk of the Court, sealed with the seal of the Court, and authenticated by the signature of the Governor and the great seal of the State, is insufficient. It should have been accompanied by a certificate from the Judge, Chief Justice, or presiding magistrate, declaring that the attestation of the clerk was in due form. *Goodman v. James*, 2 R. R. 297.

251. Foreign laws must be proved as facts. In the absence of proof of what they are, our own laws must govern. *Bonneau v. Poydras*, 2 R. R. 1.

252. The date of the election or resignation of a senator of the United States, of the appointment of a member of the President's

Cabinet, or of a foreign Minister, are matters of historical notoriety, which the Court will notice though not proved in the record. *Walden v. Canfield*, 2 R. R. 466.

253. A Bank will be responsible for the amount of a note issued by it, on proof of its loss and of the contents of the note. So, on the production of the half of a note, where the absence of the other half is fairly accounted for, the Bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half. *Murdock v. Union Bank of Louisiana*, 2 R. R. 112.

254. In an action by the holder of the half of a Bank note, where the half on which the president's signature is usually affixed has been lost, the signature of the president need not be proved. It will not be presumed that notes were ever issued without the signature of that officer. *Id.*

255. The *sub pœnâ* for a witness having been returned not executed, plaintiff's attorney made oath that, as soon as he learned that it had not been served he applied to the landlady in whose house the witness had resided, and was informed that he had left without paying the rent, and that she could not tell where he had gone. *Held* that the absence of the witness was sufficiently accounted for, and that his testimony taken in another suit might be read on the trial. *Pilié v. Kenner*, 2 R. R. 95.

256. In an action against a company, plaintiffs introduced witnesses who proved, without objection, that they had been appointed engineers of the company, by a written resolution of the board of directors. On a motion to strike out the evidence, on the ground that parole evidence of the appointment was inadmissible: *Held*, that the testimony having been received without objection, and defendants having it in their power to offer in evidence the resolutions and contract with the witnesses, if material to their defence, the motion was correctly overruled. *Langfitt v. Clinton and Port Hadson Rail Road Co.*, 2 R. R. 217.

257. To recover in a redhibitory action, a purchaser must show that he acted with, at least, ordinary care and attention, and that no act or omission of his can have occasioned the loss he attempts to throw upon his vendor. *Lyons v. Kenner*, 2 R. R. 50.

258. A return of no property found after demand of the parties, made by the sheriff on a *fieri facias* against the defendant, in an action in which sequestered property had been released on a bond, is sufficient evidence of a breach of the condition of the bond given for the release of the property sequestered in an action against the surety. *Massé v. Bârthet*, 2 R. R. 69.

259. It will be no objection to the admissibility in evidence of an act, executed by plaintiff's vendor, in relation to the land in dispute, that no evidence was adduced of its having been recorded in the office of the Parish Judge, without which it could have no effect against third persons. Whether the act is binding on the

plaintiff, is a question going to the effect and not to the admissibility of the instrument. *Kittridge v. Landry*, 2 R. R. 72. *Kittridge v. Dugas* 2 R. R. 85.

260. An instrument offered in evidence will not be rejected on the ground that it appears to have been wrongfully obtained. It will be received, and its effect tested afterwards. *Kittridge v. Landry* 2 R. R. 72.

261. Parole evidence is admissible to sustain a plea of prescription, by establishing possession, its character, and other requisites to sustain the plea; or to disprove it, by showing that the party did not possess as owner, or had renounced the benefit of prescription. *Id.*

262. A direct action is not necessary to establish the falsehood of a notarial act; it may be shown collaterally. *DeBlanc v. Martin*, 2 R. R. 82.

263. Where a witness is illiterate, or his statements appear extraordinary, evidence may be introduced to sustain his testimony, by showing that he made the same statements at the time of the transaction, though no attempt had been made to impeach his evidence or character. *Pilié v. Kenner*, 2 R. R. 95.

264. The decision of the lower Court, as to the admission or rejection of a witness not introduced at the regular time, will be affirmed, unless the discretion allowed in such cases appears clearly to have been incorrectly exercised. *Id.*

265. On a motion to dissolve an injunction, on the ground of illegality apparent on the face of the petition, no evidence can be introduced, except as to the question of damages. *Hobson v. Bein*, 2 R. R. 109.

266. The evidence necessary to support an action on a bill, as an accepted bill, and on a breach of promise to accept, is materially different. To maintain the former, the promise must be applied to the particular bill alleged to have been accepted; in the latter case, the evidence may be of a more general character, and the authority to draw be collected from circumstances, and extended to all bills coming within the scope of the promise. *Von Phul v. Sloan*, 2 R. R. 148.

267. An offer of restitution must be proved, to maintain an action of rescission. *Walden v. City Bank of New-Orleans*, 2 R. R. 165.

268. The omission by a purchaser to notify his vendor, or those who are responsible to him in case of eviction, of the action instituted against him, will not, under articles 2494 of the Civil Code, and 388 of the Code of Practice, release the latter, unless they can show that they had means to defeat the action, which were not used owing to their not having been cited in warranty, or apprized of the institution of the suit. By the word *means*, in article 2494 of the Civil Code, must be understood new facts, or peremptory exceptions, which, if presented to the Court, would

have produced a different result. It will not be sufficient to show that there was error in the judgment, for the same judgment, would have been pronounced against them, had they been cited. *Rivas v. Hunstock*, 2 R. R. 187.

269. It is no objection to a witness, offered to prove the defective construction of a railway, that he is not a professional engineer. His testimony is admissible, and should be left to the jury for what it is worth. *Langfitt v. Clinton and Port Hudson Rail Road Co.*, 2, R. R. 217.

270. To obtain a judgment against a sheriff, with damages, for his failure to return an order of seizure and sale on or before the return day, as required by the act of 7th april 1826, section 17, it must be shown that a writ of seizure and sale was actually placed in his hands, and that he failed to return it on the return day mentioned therein. A statement in the judgment appealed from, that a writ was issued, is not sufficient. Such statements are not evidence. *Destréhan v. Garcia*, 2 R. R. 291.

271. Acknowledgments by one, since deceased, proved by a witness who could not be contradicted, much less convicted of perjury, though he had sworn falsely, are the weakest kind of evidence, and scarcely worthy of any belief. But where, in an action for the value of work done for the deceased, it was proved to have been performed; and two witnesses testified to the acknowledgment of the debt, by the deceased, *in extremis*, in the presence of his wife and of the magistrate who was receiving his will, either of whom might have been produced to contradict the statement if false, and no other attempt was made to rebut or discredit the testimony, the claim will be considered sufficiently proved. *Succession of Fox*, 2 R. R. 299.

272. Where an attachment has been set aside by order of Court, it is *prima facie* evidence that it was illegally issued, and that damages to some extent have been sustained. *Cox v. Robinson* 2 R. R. 313.

273. Evidence presented by one of the parties, but not contained in the record, will not be permitted, under any circumstances, to influence the decision of the Court. *Stilwell v. Bobb*, 2 R. R. 327.

274. Cases of *Wetmore & Co., v. Merrifield*, 17 L. R. 513, and *Booraem v. Merrified*, 17 L. R. 594, overruled, so far as they go to establish that, in an action against the drawer of a bill or maker of a note payable at a particular place, proof of a demand at such place is not necessary, where want of amicable demand has not been pleaded. *Id.*

275. The possession of a bill of lading, like that a bill of exchange, is *prima facie* evidence of title; and, in the absence of contradictory evidence will entitle an intervening claimant to bond the property seized by attachment. *Park v. Porter*, 2 R. R. 342.

276. A marriage contract executed before a Notary, which attests that a sum was received by the husband from the wife, as a

part of her dowry, in the presence of the Notary and subscribing witnesses, is the best evidence of which the payment is susceptible. But it may be rebutted by evidence establishing collusion, as that the money had been obtained only for the moment, and had been repaid. *Lambert v. his creditors*, 2 R. R. 474.

277. The vendee may, generally, establish the sale, by proof of the acts and admissions of his vendor. Where fraud is suspected, the admissions of the alleged vendor, must be received with caution, but cannot be absolutely rejected. *Planters' Bank of Mississippi v. Crane*, 2 R. R. 489.

278. Putting the defendant *in morâ*, is a condition precedent to the recovery of damages for a passive violation of the contract. Such damages are only due after the debtor has been put in default, and the default must be alleged and proved; nor can evidence be received to prove a demand where it has not been alleged in the petition. *McMaster v. Brander*, 2 R. R. 498.

279. Parties are always allowed to exercise their own judgment, as to the order of introducing their proofs. *Lynch v. Benton*, 3 R. R. 105.

280. An amended petition propounding interrogatories to a party to the action, offered after the trial has commenced, will be too late. *Dabbs v. Hemken*, 2 R. R. 123.

281. A case will not be remanded, after appeal, on an affidavit of newly discovered evidence. The Court cannot notice any thing which may have occurred subsequent to the date of the judgment appealed from. *Succession of Hamblin*, 3 R. R. 130.

282. On rule against one who had been appointed, by consent of parties, to receive and sue for all debts due to the partnership of which plaintiff and defendant were members, to show cause why he should not pay the amount so received by him into Court, he may introduce evidence to show that he had paid debts due by the partnership, without first showing any authority to do so from the parties, or from either of them. A party cannot be controlled as to the order of introducing the testimony in support of his case. The authority to pay might be afterwards proved. *Kellar v. Williams*, 3 R. R. 321.

283. No evidence will be required of the official capacity of the functionaries commissioned by the State. *Follain v. Lefevre*, 3 R. R. 13.

284. It is no objection to a witness that he is interested in a case when offered to testify against his interest. *Travis v. January*, 3 R. R. 227.

285. One who had signed a sequestration bond as surety for plaintiffs, but had been released before the trial, another surety having been substituted is a competent witness for the plaintiffs. *Comstock v. Paie*, 3 R. R. 440.

286. Evidence, when required to be reduced to writing, must be taken down by the clerk, and should, in all cases, be read to the witness before he leaves the stand. The judge has no right, under

any circumstances, to add to, or take from it, without recalling the witness. *Jonau v. Ferrand*, 3 R. R. 364.

287. A broker examined as a witness to prove the market value of certain stocks, will not be compelled to disclose the names of persons to whom he has sold shares of the same stock, where there is no intimation of any intention to examine such purchasers for the purpose of contradicting him, their names being, under such circumstances immaterial. *Id.*

288. Article 439 of the Code of Practice, making it the duty of the Court which grants a commission to take testimony, to fix a day for its return, was intended to obviate any dispute as to the sufficiency of the time allowed for its execution, when the case should be called for trial before its return. But the neglect of the Court to fix a return day, will not render the commission null. *Follain v. Lefevre*, 3 R. R. 13.

289. A commission to take testimony, directed to any one of the associate judges of the City Court of New-Orleans, appeared from the record to have been executed by one N. Jackson. There being no associate judge of that name, on an objection to its admission, and allegation by the party that it was a clerical error for O. P. Jackson, an actual judge of that Court: *held*, that the record not having been corrected by *certiorari*, the error is fatal. *Id.*

290. Where a commission to take testimony has been duly executed, and returned into Court, either party may use the evidence taken under it; and this right is not waived, by omitting to cross-examine the witnesses. *Dwight v. Linton*, 3 R. R. 57.

291. Where the certificate of the magistrate, to whom a commission was addressed, attests that the witness appeared and answered the interrogatories, and signed his name thereto, after having been examined upon the holy evangelist of almighty God, it will be sufficient. The language of such a certificate is immaterial, provided it appear clearly that the requisites of the law have been complied with, *Tollett v. Jones*, 3 R. R. 274.

292. The object of the 7th section of the act of 25th March 1828, which requires that interrogatories to be propounded to witnesses examined under commission, shall be served on the opposite party or his counsel, three days previous to being forwarded, is to afford the latter sufficient time to examine them, and prepare his objections or cross-interrogatories; and where such interrogatories have been handed to a party, with a request that he will accept service thereof and return them the next day, and he acknowledges service, and returns them accordingly, with his cross interrogatories, he will be considered as having waived any further delay. *Id.*

293. As a general rule, the deposition of a witness cannot be read, if his personal attendance can be procured. *Hawkins v. Brown*, 3 R. R. 310.

294. The deposition of a witness, to whom cross-interrogatories

were propounded by the opposite party, having been taken *de bene esse*, and returned into Court, the latter objected to its admissibility, on the ground that the witness, who was within the jurisdiction of the Court, should have been produced in person. *Held*, that the depositions were inadmissible; and that it could not be inferred from the fact that no objection was made to the dispositions previous to the trial, that the opposite party intended to dispense with the personal attendance of the witness. *Id.*

295. The probate of a will is a judicial proceeding, and must be authenticated according to the act of Congress of 26th May, 1790. *Succession of Bowles*, 3 R. R. 33.

296. The certificate of the clerk of a Court in another State, that the transcript, is a true copy from the original filed in my office, as proven in open Court, at the October term, 1841, and ordered by the Court to be recorded, is not such evidence of the testament having been duly proved, before a competent judge of the place where it was received, as will authorize its admission to probate and execution in this State. It does not show how the will was proved, nor what was the order of the Court. Duly certified copies of the orders or decree in relation to the proof and recording of the will, should have accompanied the transcript of the latter. *Id.*

297. It is not enough that a clerk certify the result of the action of a Court; he must make copies of what appears on the records of which he is the keeper. *Id.*

298. An instrument, signed by a Parish Judge alone, purporting to be the *procès-verbal* of the sale of real estate belonging to a succession, which recites that the sale was made in pursuance of a decree of the Court of Probates in which the succession was opened, and of the advice of a family meeting, is insufficient to establish the existence of the decree. *Beard v. Morancy*, 3 R. R. 119.

299. Letters of executorship, under the hand and seal of the judge of the Court of Probates, are conclusive evidence of the facts they purport to establish; nor can the jurisdiction of the judge be inquired into collaterally. *Succession of Hamblin*, 3 R. R. 130.

300. Where the meaning of an instrument is uncertain, the record of another suit, by a different plaintiff, but to which the defendant was a party, will be admissible in evidence to show, by the acts and declarations of the latter what his understanding of the instrument was. The present plaintiffs, not having been parties to the suit, cannot avail themselves of the statements in the pleadings as judicial admissions, absolutely conclusive of the rights of the defendant. They must be considered simply as other declarations. *Wells v. Compton*, 3 R. R. 171.

301. Surveyors' plats, made under the order of Court, in a suit to which defendant, against whom they are offered, was a party, though the plaintiff was not, are admissible in evidence as circumstances, so far as they show acts of the defendant. *Id.*

302. The statements of witnesses taken down in a suit by a different plaintiff, but to which the defendant was a party, cannot, as a general rule, be received in evidence against the latter; *aliter*, where the testimony of a witness so taken down is offered to discredit the evidence subsequently given by him; or where the declarations of a deceased surveyor are offered to explain his operations. *Wells v. Compton*, 3 R. R. 171.

303. The record of another suit, when offered to support a plea of *res judicata*, is admissible to show what the parties claimed, and what was decided in such suit. So the record of another suit, to which the plaintiffs were parties, though joined with others and in a different capacity, is admissible against them, when offered by the defendants, who were plaintiffs in that case; the latter are entitled to the full benefit of any decision made on the rights of the parties, and to show that the plaintiffs have compromised any of their rights by that suit. *Id.*

304. The registers of the land-offices of the United States, may, like all other keepers of public records, give copies or extracts from any books or documents in their custody, and such copies, when duly certified, are admissible in evidence. But they cannot attest or certify the contents of such books or documents in any other manner. *Judice v. Chretien*, 3 R. R. 15.

305. The provisions of articles 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a *fi. fa.* to be recorded in the office of the clerk of the Court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of 24th March, 1810, which declares, section 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the Parish Judge of the parish in which it is situated; nor that of 26th March, 1813, providing, section 1, that sales of land or slaves, under execution, shall, except between the parties, be void, unless so recorded. *Lee v. Darramon*, 3 R. R. 160.

306. The act of the thirteenth of March, 1827, relative to the protest and notices to drawers and endorsers of bills and notes, does not change the general commercial law, as to the diligence to be used in serving notices of protest; it merely provides a new mode of proof of such diligence, by authorising the notary or other officer to state in his protest, the manner in which the demand was made of the drawer, acceptor, or person by whom such order or bill was drawn or given, and, in a certificate subjoined thereto, the manner in which the notices were served or forwarded, and by making a certified copy of such protest and certificate evidence of all the matters therein stated. The provisions of this act being in derogation of the general commercial law, the mode of proof

which it authorizes will be received as sufficient evidence of notice, only where the formalities it prescribes have been strictly complied with. *Duncan v. Sparrow*, 3 R. R. 164.

307. Parish surveyors are regularly appointed officers known to the law, and when dead, their declarations, taken in other suits, may be used, when necessary, as evidence to explain their acts. So plats made by a parish surveyor under orders of Court, in a suit to which defendant was a party, are admissible, after the decease of the former, to prove the declarations of the defendant made at the time of the survey. *Wells v. Compton*, 3 R. R. 171.

308. The official acts and certificates of parish surveyors are entitled to full faith and credit, in all of the Courts of this State. *Id.*

309. The *proces verbal* of a survey made by a parish surveyor, is legal evidence of the acts which it recites, as that notice was given, that the parties attended, &c. *Id.*

310. A power of attorney admitted to record in another State is not a record or judicial proceeding of any Court, within the meaning of the act of Congress of 26th May, 1790. A copy of such an instrument, must be certified in the manner required by the act of 27th of March, 1804. *Reynolds v. Rowley*, 3 R. R. 201.

311. In controversies between the original grantee of a tract of land, or those claiming directly under him, and one in whose favor, as assignee, the title has been confirmed by the commissioners of the United States, the certificate in favor of the latter, and the facts recited in it, will not be evidence, but the confirmation will enure to the benefit of the party having the inchoate title. Otherwise, as to the third persons showing no title. The commissioners appointed to decide upon land titles emanating from the former sovereigns of Louisiana, being authorized, by different acts of Congress, to confirm inchoate titles existing at the time of the change of government, in favor of certain grantees, or their legal representatives, had authority, incidentally, to decide whether one who claimed, not as original grantee, was entitled to a confirmation; and such confirmation, in favor of an assignee, has been uniformly regarded as entitling the latter to a patent. It is evidence against the government, and though not binding on the origieal grantee, or those claiming under him, is *primâ facie* evidence against the rest of the world. *Thomas v. Turnley*, 3 R. R. 206.

312. A document certified by the Secretary of State of another State, under his hand and the great seal of the State, to be a corrected copy of an act of the Legislature, on file in his office as having been approved on a particular day, is sufficiently attested. *Commercial Bank of Natchez v. King*, 3 R. R. 243.

313. A receipt of the receiver of public moneys, for the price of government lands, is sufficient evidence of title from the United States to form the basis of a petitory action. Not that it is of equal dignity with a patent, but evidence of an equitable title on which the owner may recover. *Lott v. Prudhomme*, 3 R. R. 293.

314. The certificate of a notary, that no note signed or endorsed by a particular person, was protested by him within a certain period, is inadmissible. A notary can only certify copies of proceedings in his office; any other fact, within his knowledge, must be disclosed under oath. *Exchange and Banking Company of New-Orleans v. Boyce*, 3 R. R. 307.

315. Under the act of Congress of 26th May, 1790, an act of the Legislature of another State can only be authenticated by affixing the seal of the State thereto. *Union Bank of Maryland v. Freeland*, 3 R. R. 485.

316. A copy of an act of the Legislature of another State, certified to have been made, *from liber* I. G., one of the law records of the State, belonging to the office of the Court of Appeals, is inadmissible. A copy from the original deposited among the archives of the State, would be better evidence. *Id.*

317. Proof of the signatures of the grantor, and of that of one of the subscribing witnesses, residing in another State, is sufficient evidence of the execution of a deed *sous seign privé*. *Thomas v. Turnley*, 3 R. R. 206.

318. Article 2256 of the Civil Code, which provides, that parole evidence shall not be received against or beyond what is contained in written acts, is inapplicable to a case where the defendant offers witnesses to prove that the endorsement of a note was merely as security, and that it was to be paid out of collections to be made by him from claims due to the drawer. The evidence neither explains, nor contradicts the written instrument, but goes to establish a collateral fact or agreement in relation to it. *Dwight v. Linton*, 3 R. R. 57.

319. Parole evidence is admissible to show that the vendor made known, at the time of the sale, the defects of thing sold. *Hawkins v. Brown*, 3 R. R. 310.

320. Parole evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale. *Bell v. Firemen's Insurance Company of New-Orleans*, 3 R. R. 423. *Bell v. Western Marine and Fire Insurance Company*, 3 R. L. 428.

321. A claim for conventional interest must be established by written proof. C. C. 2895. *Lambeth v. Burney*, 3 R. R. 251.

322. Plaintiff offered in evidence copies of deeds taken from the records of the office of the Parish judge, on making oath that he had inquired in vain, from all persons who were likely to have any knowledge of the matter, for the originals, which he believed had been lost or destroyed. It was shown that the deeds were more than thirty years old; that the record of conveyances had been regularly kept; that it was formerly the practice to give back the originals after they were recorded; and that the Parish judge and subscribing witnesses were dead. Other circumstances tended to show that the deeds were genuine. *Held*, that the copies were properly admitted. *Thomas v. Turnley*, 3 R. R. 206.

323. The admission of irrelevant testimony is not ground for remanding a case for a new trial, where its exclusion would not probably vary the result. *Ferguson v. Whipple*, 3 R. R. 344.

324. Instead of striking out any portion of the pleadings, a more regular course is to permit the parties to go to trial, and to reject, on the objection of the opposite party, any evidence offered to sustain such portion. *Jonau v. Ferrand*, 3 R. R. 364.

325. Where a sheriff has received a tax roll and undertaken its collection, he must show that he has used due diligence. He cannot throw upon the State, the burden of proving that he actually received the amount. *Scarborough v. Stevens*, 3 R. R. 147.

326. A party, who seeks to render another liable for the debt of a third person, must prove such liability beyond all doubt, or he cannot recover. C. C. 3008. *Hazard v. Lambeth*, 3 R. R. 378.

327. In an action in this State, against the endorser of a note dated at a place in this State, in the parish in which the endorser resides, payable in another State the presumption will be, until the contrary is shown, that the note was endorsed at the place of its execution; and the obligation will be governed by the *lex loci contractus*. *Duncan v. Sparrow, application for a re-hearing*, 3 R. R. 167.

328. The acknowledgment and payment, by tutors, curators and executors, of debts due from the estates administered by them, are *primâ facie* evidence of their correctness. When, from the extravagance of the charges the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, Courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses or of their depositions, would involve the estate in heavy and unnecessary expense. *Succession of Frantum*, 3 R. R. 283.

329. Proof that the notice of protest was deposited in the post-office at 7 o'clock A. M., the day after the protest, shows due diligence; and it will be presumed, in the absence of evidence to the contrary, that the notice was in time to go by the mail of that day. *Commercial Bank of Natchez v. King*, 3 R. R. 243.

330. Where the record does not show whether a slave was delivered to the vendee at the time of the adjudication, or after the execution of a notarial act, it will be presumed that the vendor retained possession until the act of sale was passed. C. C. 2588. *Hivert v. Lacaze*, 3 R. R. 357.

331. Any consent given or admission made on record, by a party, in the progress of a suit, from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect. *Aliter*, where such consent or admission confers no right, as where

experts have been appointed, by consent, to ascertain a fact, in which case either party may move to rescind the order, or it may be done by the Court *ex-officio*. *Kohn v. Marsh*, 3 R. R. 48.

332. In an action against a seizing creditor and the sheriff, in which plaintiff prayed for an injunction and damages, he cannot call upon the latter to testify as a witness. He must release him, or propound interrogatories to him as a party. *Dabbs v. Hemken*, 3 R. R. 123.

333. A party to a suit, interrogated as to a particular fact, cannot, under the pretext of answering the interrogatory, annex to his answer letters of a third person, and thus introduce in evidence statements not under oath, for the purpose of influencing the jury on other points in the case. *Reynolds v. Rowley*, 3 R. R. 201.

334. In contests between the creditors of an insolvent, the confessions or acknowledgments of the latter are not evidence. Such declarations are presumed to be fraudulent. *Blackstone v. his creditors*, 3 R. R. 219.

335. A party to a suit is not bound to answer interrogatories propounded to him by his opponent, unless ordered to do so by the Court. C. P. 348. *Commercial Bank of Natchez v. King*, 3 R. R. 243.

336. Where a party has repeatedly and publicly declared himself to be a resident of a particular parish, he will not be allowed, though actually residing elsewhere, to gainsay his own declarations, which may have misled others. *Id.*

337. When an action commenced by an administrator, is carried on, after the expiration of his administration, by the heirs, the defendant cannot examine him as a party, by annexing interrogatories to an amended answer. The term of his administration having expired, he has no interest in the case, and cannot be interrogated as a party. *Lawkins v. Brown*, 3 R. R. 310.

338. An attorney cannot object, on the ground of professional confidence, to being interrogated as to the manner in which he became possessed of papers introduced by him in support of his client's cause, where it does not appear that he received them from his client or his agent. *Reynolds v. Rowley*, 3 R. R. 201.

339. An attorney is not admissible as a witness to disclose facts, the knowledge of which he acquired confidentially, in the practice of his profession. But when in possession of papers belonging to his client's adversary, or when called on, after having had them in his possession, to disclose what he has done within them, or to point out where they may be found, the rule does not apply; and he may be as properly called on to produce the papers necessary to establish the rights of the adverse party, if still in his possession, or interrogated as to facts which may lead to the discovery, as his client himself could be. C. P. 140, 473. *Travis v. January*, 3 R. R. 227.

340. The declaration of one who had acted as an agent, made

after the termination of his agency, are not binding on the principal, though the former be dead at the time of the trial. *Reynolds v. Rowley*, 3 R. R. 201.

341. To maintain an action for a malicious prosecution, the plaintiff must prove: 1st, the prosecution; 2d, that the defendant was the prosecutor, or the cause of the prosecution; 3d, that he was actuated by malice; 4th, that there was no probable cause for the prosecution. *Grant v. Deuel*, 3 R. R. 17.

342. In an action for a malicious prosecution, malice may be established: 1st, by proving express malice; 2d, by showing want of probable cause for the prosecution. Malice is usually inferred from the want of probable cause. *Id.*

343. It is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for the charge. Where express malice has been proved, there must be some positive evidence to show that the prosecution was groundless, though slight evidence will be sufficient. *Id.*

344. An acquittal or even subsequent proof of complete innocence, is not sufficient evidence of want of probable cause. *Id.*

345. Proof that the jury entertained doubts on the evidence, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause of prosecution. *Id.*

346. Petition by the syndics of an insolvent for a division of partnership property by sale. Four experts having been appointed, by consent, to report whether the property could be divided in kind, without loss or inconvenience, and two only having reported, on motion of plaintiffs the order appointing experts was rescinded, and the Court proceeded to receive other evidence of the facts intended to be established by their report. *Held*, that the report of the experts was not the only mode of proof to which the Court might resort, to enable it to decide whether the property should be sold; and that, under article 1261 of the Civil Code, any other legal evidence might be received. *Kohn v. Marsh*, 3 R. R. 48.

347. A petitory action may be maintained against a naked possessor, upon a title which, if accompanied by possession, would be regarded as a just title. *Thomas v. Turnley*, 3 R. R. 206.

348. A petitory action may be defeated, by showing that the title is in a third person, or that the latter has a better title than the plaintiff. *Id.*

349. To recover against a mere trespasser, who sets up no title in himself or in any other person, it is unnecessary that the plaintiff should show a title, perfect in all respects; one apparently good will suffice. *Baillio v. Burney*, 3 R. R. 317.

350. In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract. *Tippett v. Jett*, 3 R. R. 313.

351. Proof of an offer by the vendor to annul the sale of a slave, on the payment of a certain sum, will exonerate the plaintiff, in a redhibitory action, from the necessity of proving a tender to the slave. The tender would have been useless, without the payment of the sum demanded. *Hivert v. Lacaze*, 3 R. R. 357.

352. The purchaser of a slave, to entitle himself to the benefit of the third section of the act of 2d January, 1834, which provides that one who institutes a redhibitory action on the ground that the slave is a runaway or thief, shall not be bound to prove that such vice existed before the sale, when discovered within two months thereafter, where such slave had not been more than eight months in the State, must show that the slave has not resided therein for eight months preceding the sale. *Smith v. McDowell*, 3 R. R. 430.

353. A counter-letter, or something equivalent thereto, is the only proof admissible to establish simulation, not fraudulent, between the parties to a contract, or their representatives. Parole evidence is inadmissible. *Liautaud v. Baptiste*, 3 R. R. 441.

354. The father of certain natural children, who had made a sale of all his property to a third person, by a subsequent marriage legitimated his children. After the death of the father, the property was sold to a fourth. In an action by the children against the latter, to recover the property on the ground that the sales were simulated, plaintiffs alleged that it was agreed between the deceased and his vendee that, notwithstanding the sale, the former should remain the owner of the property which should be reconveyed to him when required, or to his children in case of his death, and that the sale was in the nature of a *fidei commissum*, and as such, prohibited by law. *Held*, that the interest of the plaintiffs, who were subsequently legitimated, not having existed at the date of the first sale, parole evidence was inadmissible to prove that it was a *fidei commissum*; that the object of the action is to enforce the *fidei commissum* complained of; and that the plaintiffs cannot, under the pretext that it was a *fidei commissum*, be allowed to establish the simulation of the sale, and thereby give effect to the very agreement prohibited by law. *Id.*

355. The subsequent return of a party, whose property had been attached on an affidavit that he had left the State for the purpose of never returning, will not alone be sufficient ground for dissolving the writ, where circumstances render it probable that his original intention was not to return. The intention of returning should have been clearly proved, to entitle the defendant to a dissolution of the attachment. *Reeves v. Comly*, 3 R. R. 363.

356. Where a slave ordered to be emancipated by will, sues to establish her right to freedom, she must prove that she is thirty years of age, or a native of the State, and that she has behaved well during the four preceding years. Act 9 March, 1807, C. C. article 185. The act of 31st January, 1827, effected no other change in

the law than to authorize, under certain circumstances emancipation before the thirtieth year. *Nolé v. De St. Romes*, 3 R. R. 484.

EXCEPTION.

1. The exception of *quæ temporalia sunt ad agendum, sunt perpetua ad excipiendum*, exists only in favor of the defendant in possession of the property or right sought to be recovered. *Delahousaye v. Dumartrait*, 16 L. R. 91.

2. So where a person has delivered possession of property or *ratified a sale when a minor*, he cannot afterwards bring a petitory action, to compel the purchaser to produce his title; and then by way of *exception*, ask for the rescission or nullity of the sale, when in fact he was barred by prescription from bringing a direct action of rescission or nullity. *Id.*

EXCEPTIONS.

1. Where the defendant was sued on his promissory note, and averred, that the plaintiff was not the real owner and had no right to sue: *held*, that this is neither a dilatory, declinatory, or peremptory exception, but is considered as answer to the merits. *Burns v. Haynes et al.*, 13 L. R. 12.

2. Exceptions which come in by way of *proviso*, or in a subsequent statute, are properly matters of defence. So, the *proviso* in the registry act, being by way of exception from the enacting clause, need not be taken notice of in a libel to enforce the forfeiture. It is matter of defence to be set up by the party in his claim. 9 Wheaton 421. *Mathews v. Pascal's executor*, 13 L. R. 47.

3. Bills of exception to the admissibility or rejection of evidence should state the grounds on which the party relies in so clear a manner as to enable the Court to comprehend them. Inadmissibility is, perhaps, too general an objection. *Le Bret v. Belzons*, 13 L. R. 93.

4. An exception which, on the face of it, is frivolous, and puts nothing at issue, need not be set for trial, but may be dismissed on motion. *Bank of Orleans v. Rice*, 13 L. R. 277.

5. The exception of domicile should be first acted on, before swearing the jury to try the issue, if the party is desirous of availing himself of it. *Goldenbow v. Wright*, 13 L. R. 371.

6. Where the same fact is the ground of a dilatory exception and also of the merits of the action, it must be acted on in the trial of the cause; otherwise the fact would be tried summarily, and could

not be submitted to a jury. *Hobson & Co. v. Whittemore et al.*, 13 L. R. 422.

7. A dilatory exception taken *in limine litis*, may be pleaded in the beginning of the answer to the merits. *McGuire v. Peck*, 14 L. R. 187.

8. The party who fails to offer evidence of the facts on which his exception rests, and proceeds to trial on the merits, may be held to have waived the exception. *Gay v. Ardry*, 14 L. R. 288.

9. Where an exception is put in at the argument of the Supreme Court, suggesting that the contracts between the parties to the suit, are illegal, immoral and contrary to public policy, the Court is bound to notice it even without any plea; and in such cases no recovery can be had. *Gravier's curator v. Carraby's executor*, 17 L. R. 132.

10. An exception which goes to the absolute want of any right in the plaintiff to stand in judgment in any manner may be pleaded after issue joined on the merits, or at any stage of the case. *Union Bank v. Dunn et al.*, 17 L. R. 234.

11. The peremptory exception given by the 1988th article of the Louisiana Code, which says: no creditor can sue individually to annul contracts *made before his debt accrued*, applies to all contracts in *fraud of creditors*, when it appears the debtor never ceased to have possession of the property apparently sold by him. *Thibodeaux v. Thomasson et al.*, 17 L. R. 353.

12. The judge is not required to sign a bill of exceptions which does not embrace the true ground of his opinion. A party taking a bill of exceptions must spread on its face every thing necessary to bring the point in its true light before the Court. *Barataria and Lafourche Canal Company v. Field et al.*, 17 L. R. 421.

13. The exception of *lis pendens* may be waived, and will be so considered when the party fails to use it. *Cazeau v. Lesparre*, 14 L. R. 498.

EXCEPTIONS, BILL OF

1. Where the attention of the Court has not been drawn to a bill of exceptions in the record, either by the points filed, or on the first hearing of the case, it will not be noticed on a re-hearing. *Petitpain v. Palmer and husband on a re-hearing*, 1 R. R. 221.

2. Any attempt to amend a bill of exceptions, after judgment signed, is wholly irregular. *Police Jury of Pointe Coupée v. Gardiner*, 2 R. R. 139.

3. On the trial of an exception to the petition, and during the argument of defendant's counsel, plaintiffs offered in evidence letters of tutorship and administration, which were excepted to as too late. The bill of exceptions did not expressly state whether the

evidence had been closed. *Held*, that such an objection is a weak one; and that the bill of exceptions should have stated all the circumstances with particularity, to enable the Court to determine whether the evidence ought to have been excluded, on a ground purely technical. Objection overruled. *Langfitt v. Clinton and Port Hudson Rail Road Co.*, 2 R. R. 217.

4. A bill of exceptions is only necessary, where something is to be brought to the knowledge of the Appellate Court, which would not otherwise appear in the record. *Harrison v. Waymouth*, 3 R. R. 340.

EXECUTION.

1. The return of *nulla bona*, as to one of two defendants against whom a writ of *fieri facias* has issued, and the writ being stayed as to the other, a separate *ca. sa.* cannot legally issue. The execution must conform to the judgment, which is the sole authority that warrants the process. There being but one judgment, there can be but one execution and satisfaction. *Blanchard v. Zacharie*, 15 L. R. 541.

2. So where a judgment *in solido* is obtained against three defendants, and separate executions issue, but stayed as to one, and as to the other two defendants returned *nulla bona*, and *ca. sas.* are taken out against each of them separately, one of which is stayed, and the other proceeded against until he gave bond and security for the prison limits: *held*, to be illegal, and the surety in the bond discharged; because the plaintiff cannot have, at the same time, a *ca. sa.* against one, a *fi. fa.* as to a second, and proceedings suspended in relation to a third. *Id.*

EXECUTIVE DEPARTMENTS OF THE U. STATES.

1. It will not be presumed that an act of one of the executive departments, was performed without the concurrence of the President; and his directions in the premises, or ratification of the act, need not be shown. In the performance of his constitutional duty to see that the laws are executed, the President acts generally through the executive department; and the acts of these departments, must be considered as his. *Culliver v. Berge and another*, 1 R. R. 427.

EXECUTORS.

1. Where the executor refused to deliver up the estate of the tes-

tator to the widow, as natural tutrix of the minor children and heirs, on account of the danger to be apprehended from waste and dilapidation she might occasion the estate: *held*, that in case of real danger, the legal way to avert it is by provoking the removal or destitution of the tutrix. *Clague's widow v. Clague's executors*, 13 L. R. 1.

2. The widow, as tutrix of her children, who are forced heirs of the testator, can at any time take the *seizin* from the testamentary executors on offering them a sufficient sum to pay the moveable legacies. *Id.*

3. The dispositions in a will, in which property of the estate is to *remain in the hands of executors* until the testator's children or heirs arrive at the age of majority, cannot be distinguished from one that would authorize the executors to keep and preserve it for, and return the estate to them, which is a *fidei commissum*, or trust, and is forbidden by law. *Id.*

4. The testator has not the power to extend the period of the executorship to more than one year; nor to direct that the estate should remain in the hands of the executors afterwards; or that they should keep and preserve it for another or others, when there are forced heirs who are present. *Id.*

5. Where an executor's account was rendered in 1804, and appears to have been communicated to the adverse party without objection, or any proceedings had in relation to it, until 1820, it was presumed to have been acquiesced in, and the Court adopted it as the basis of its judgment, being the safest mode of doing justice between the parties. *Hodge's heirs v. Durnford's curator*, 13 L. R. 187.

6. An extra-judicial settlement of an estate between the executors and heirs, when the parties are all of age and under no disability of contracting, is perfectly valid, and rests necessarily on the same footing as any other convention. *Id.*

7. In an action by the heirs of the testator, the homologation of the executor's account is no bar to the introduction of evidence to show that the executor had received funds for which he had not accounted, or failed to put in any previous account, when it is offered before he is discharged. *Johnston's heirs v. Cox's syndic*, 13 L. R. 536.

8. In case of uncertainty as to the amount due, the executor cannot complain, as it was his duty to have prevented this by rendering a correct account of his administration. *Id.*

9. An executor cannot be purchaser of the property of the estate he administered, when sold at public auction by order of the Court of Probates. He cannot be buyer and seller. *Baldwin's executors v. Carleton*, 15 L. R. 394.

10. So an executor who is a professional man and renders legal services to the estate he administers, is not entitled to any separate compensation, according to the practice in England. *Id.*

11. When an executor receives money of the estate, from a co-executor, or applies it improperly to his own use, it is considered still as money in his hands, as executor, for which he is accountable, and it may be recovered in the Court of Probates. *Baldwin's executors v. Carleton*, 15 L. R. 394.

12. The judge of Probates has the faculty and power given him to appoint dative testamentary executors, but it is a faculty he is to exercise according to law, and not in accordance with his will and pleasure, appointing whom he chooses. *Girod's heirs and legatees v. Girod's executor*, 18. L. R. 394.

13. The beneficiary heirs are first entitled to be appointed dative testamentary executors, when the testator has failed to name any in the will; and the legal heirs being entitled to the benefit of inventory, the estate must be administered under such benefit and according to the rules provided for the administration of such successions. *Id.*

14. Where beneficiary heirs are appointed dative executors to a succession administered with the benefit of inventory, they are required to give security in the same manner as curators of estates. *Id.*

15. Where strangers are appointed dative testamentary executors by the judge, disregarding the applications of heirs and legatees, the appointment will be annulled. *Id.*

16. The mayor of a city receiving a legacy, *as trustee*, is not entitled to preference for the appointment of dative testamentary executor, as a legatee or creditor of the estate. Persons who receive a legacy *in trust* for others, have no more right of preference than the agent of a creditor or stranger. *Id.*

17. Notice of an application for the appointment of dative testamentary executors must be given, in all cases, in the same manner as for curators or administrators of estates. *Id.*

EXECUTORY PROCESS.

1. Where one who has sold a tract of land and slaves, and received in payment from his vendee notes secured by mortgage on the property, takes back the land and gives up the notes with the exception of one equal to the value of certain slaves retained by the vendee, which he endorses; on an application by the holder for an order of seizure and sale: *held*, that the vendor being personally liable for the debt, cannot be considered as a third possessor, and entitled to the notice required by the Code of Practice, art. 69. A third possessor is one, who not being liable for the debt, has the privilege of discharging himself by abandoning the mortgaged premises. *Duncan v. Elam*, 1 R. R. 135.

2. Where on an application for an order of seizure and sale, the act of mortgage is annexed to the petition, which concludes with a

prayer that the slaves mortgaged may be seized and sold, all the slaves mentioned in the mortgage may be included in the order of sale, though a part of them are not named in the petition. *Duncan v. Elam*, 1 R. R. 135.

3. On an application for an order of seizure and sale by the holder of a note endorsed by the defendant, and secured by mortgage on property sold by the latter to a third person, by whom the note was made, but subsequently reconveyed, proof of the recording of the original act of sale will not be necessary as against the defendant, he being owner and possessor of the property and personally bound for the debt. *Id.*

4. Where the price of a sale is payable in several instalments, for each of which a separate note has been given, secured by mortgage, the hypothecary action will lie for the whole price, immediately after the maturity of the first note; but the terms of the sale must be, cash for the first instalment, and the balance payable as the subsequent instalments respectively become due. *McDonough v. Fost*, 1 R. R. 295.

5. An order of seizure and sale is always granted *ex parte*; no previous notice is required. The notice mentioned in art. 735 of the Code of Practice is not required to be given before the order of seizure and sale, but before the seizure is made; the object of this notice is, to give the debtor an opportunity of preventing the seizure by an application to the judge. *Id.*

6. Article 3361 of the Civil Code, so far as it requires proof of the failure of payment to entitle a party to an order of seizure and sale, is repealed by article 63 of the Code of Practice, when the hypothecated property is in the hands of the debtor, and the creditor has, besides his hypothecary right, a title importing a confession of judgment, he may have the hypothecated property seized immediately, without any proof of failure of payment. Art. 63 of the Code of Practice dispenses with the necessity of putting the mortgagor *in morâ*, before obtaining an order of seizure and sale, if such necessity ever existed. *Id.*

7. No other testimony is required to support an order of seizure and sale, than the authentic act containing the confession of judgment. *Id.*

8. Plaintiff mortgaged a slave to defendant, an attorney, to secure the payment of three hundred dollars, in consideration of his paying a debt of eight or ten dollars due by the former to a third person, and conducting a suit for him for the recovery of a tract of land. Defendant paid the debt, but took no steps towards instituting the suit. On an application to enjoin an order of seizure and sale obtained by the latter, injunction perpetuated, on the ground that the payment from the smallness and uncertainty of its amount, the principal part of the consideration having failed would not authorize the resort to an order of seizure and sale;

reserving to defendant his right to recover back the amount paid by him. *Falcon v. Boucherville*, 1 R. R. 337.

9. Though it may well be doubted, whether, in a regular hypothecary action, the party in possession is bound to give notice of the seizure of his vendor, as a demand must be made of the principal debtor thirty days before resorting to the mortgaged property in the hands of a third possessor, which may be considered as sufficient notice, yet where the property is seized in the hands of the latter, under the decree of Court, having no jurisdiction to order said seizure, *ratione materiæ*, it will be his duty to resist such illegal process, or to notify his vendor. *Landry v. Gamet*, 1 R. R. 362.

10. No order of seizure and sale can be issued against a party, on an act purporting to be signed by an attorney in fact, where no power of attorney was exhibited, nor any authentic evidence of the subsequent ratification of the act was produced, at the time of applying for such order. An order illegally granted under such circumstances, will be rescinded, though on the trial of a motion to dissolve an injunction obtained against such order, facts should be established, by oral evidence, amounting to a ratification by the principal, of the act of the attorney. *Tildon v. Dees, tutrix*, 1 R. R. 407.

11. An order of seizure and sale obtained against a third person, will be set aside when the mortgage was not proved to have been recorded. *Cassidy v. his creditors*, 2 R. R. 47.

12. An injunction, and not a rule to show cause, is the proper proceeding to arrest an order of seizure and sale. C. Practice 738. *Clement v. Oakey*, 2 R. R. 90.

13. Ground, comprising several squares in the city of New-Orleans, was mortgaged to plaintiff, and described in the act according to the plan of the city as it existed at the time. By subsequent proceedings of the municipal authorities, the names of the streets, and numbers and boundaries of the squares were changed: *held*, that the advertisement of the property to be sold according to the old plan, was no cause to rescind the order of seizure and sale; and that the alterations made by the municipal authorities were matter of public notoriety. *Id.*

14. Where a party wishes to obtain an execution on a judgment rendered in another State, he must produce a record attested in the mode pointed out in that part of the Code of Practice regulating executory process. A transcript certified by the clerk of the Court, sealed with the seal of the Court, and authenticated by the signature of the Governor and the great seal of the State, is insufficient. It should have been accompanied by a certificate from the judge, chief justice, or presiding magistrate, declaring that the attestation of the clerk was in due form. *Goodman v. James*, 2 R. R. 297.

15. The possession of a promissory note, payable to order and endorsed in blank, is *primâ facie* evidence of title, the property passing by delivery. No other transfer is necessary to entitle a

party to avail himself, *via ordinaria*, of a mortgage given to secure its payment; but to proceed *via executiva*, the mortgage must be transferred by an authentic act. *Fitzwilliams v. Wilcox*, 2 R. R. 303.

16. Where a mortgage contains the clause *de non alienando*, no transfer of the property can affect the mortgagee's right to proceed against it, summarily, as if still belonging to the mortgagor. *Murphy v. Jandot*, 2 R. R. 378.

17. The provisions of the Code of Practice art. 746 et seq., authorizing summary process to enforce judgments rendered in other States or in foreign countries, instead of the ordinary action on the record, which was formerly the only mode of proceeding, must be strictly pursued; and the party resorting to it must show, that he comes clearly within the law; not in appearance only, but in reality. *Miller v. Gaskins*, 3 R. R. 94.

18. Defendant having procured an order of seizure and sale, on a judgment rendered in another State, against the plaintiff, a resident of Louisiana, under process of arrest, the latter enjoined the proceeding, alleging that, though it appears from the record an answer was put in for him by an attorney, that no one was authorised to appear for him and that he never appeared or defended the action. On a motion to dissolve, on the ground that the facts alleged, though true, are insufficient to maintain the injunction: *held*, that admitting the allegations of the petition to be true, the judgment can have no greater effect than one rendered, after personal service, but without appearance, on a judgment by default; and that the motion should have been overruled. *Id.*

19. Defendant having obtained a judgment against plaintiff in another State, levied an execution on property of the latter in that State; the sale of which was deferred for twelve months, in consequence of not bringing two-thirds of its appraised value. Defendant thereupon, procured an order of seizure and sale in this State, which plaintiff enjoined. On the trial the injunction was maintained, until the succeeding term, reserving to the parties the right to show whether the judgment had been satisfied out of the property originally seized, or the remedy exhausted. On an appeal by defendant: *held*, that it is oppressive to carry on two executions at the same time, and that the judgment should be affirmed. *Newell v. Morton*, 3 R. R. 102.

20. Where the sheriff's deed for immoveable property sold under a *fi fa.*, subject to a previous mortgage, has not been recorded in the office of the Parish judge of the parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Lee v. Darramon*, 3 R. R. 160.

21. Defendants having obtained a judgment against plaintiff in a Circuit Court, in another State, procured an order of seizure and sale in this. Subsequently to the order of seizure, plaintiff obtained an injunction from the chancellor of the State in which the original

judgment was rendered, staying its execution until the further order of Court. On an application to enjoin the order of seizure and sale: *held*, that the injunction should be maintained until the termination of the chancery proceedings on the original judgment. *Brien v. Loftus*, 3 R. R. 163.

EXECUTORS, ADMINISTRATORS AND CURATORS.

1. A. B., executor of C. D., cannot contract with A. B.; because A. B., executor, and A. B., are both one natural person. So, the agent of an executrix for the sale of the estate she administers, cannot contract with himself, and buy at the sale, part of the estate; because the agent of the executrix is seller and buyer, and are both one natural person; there is no mutation of property. *Scott's executrix v. Gorton's executor*, 14 L. R. 111.

2. Where the wife is executrix, selling the property of a succession and her husband acts as her agent in making the sale, and purchases; if there be any mutation of property, it passes to the husband and wife, and belongs to the community. The law inhibits all contracts between husband and wife. *Id.*

3. Executors as well as curators, tutors and other mandatories, are prohibited from purchasing part of a succession administered by them, on pain of nullity, at a sale of property to pay the debts of the succession. *Scott's executrix v. Gorton's executor*, 14 L. R. 115.

4. The nullity resulting from a prohibited sale to executors, of property administered by them, is *absolute*. No subsequent ratification can give it effect against third persons, interested, who are not parties to the ratification. *Id.*

5. Where an administrator sues in the District Court, and exhibits evidence of his appointment, this Court cannot inquire, collatorally, into the propriety of such an appointment by the Court of Probates. *Dunbar v. Thomas*, 14 L. R. 332.

6. An administrator has the right to enforce payment of all debts due to the estate he administers, which are still in his hands, and the proceeds of which when paid, are liable to the debts of the estate. *Id.*

EXECUTOR AND ADMINISTRATOR.

1. The mere fact of a person's dying in another parish, is not conclusive that his succession ought to be opened and administered there; or that it ought not to be administered in another parish, when, from an inventory, the deceased left property. *Gary v. Sandoz*, 16 L. R. 11.

2. When a succession has been opened and partially administered in a parish where the deceased left property, the former proceedings, will be considered as *prima facie* evidence of the facts necessary to base the jurisdiction on an application to continue and complete the administration in the same place. *Gary v. Sandoz*, 16 L. R. 11.

3. Judgment creditors of an estate in the course of administration, cannot take out execution against the administrator, without first notifying such judgment to him, that he may show he has no funds to satisfy and pay it. *Carrière & Borduzat v. Meyer et al.*, 16 L. R. 126.

4. Creditors having judgments against an estate, have it in their power, at any time, to compel the administrator to account and show the true state of the funds. *Id.*

5. The 7th section of the act approved March 13, 1837, continuing the executorship, only applies to such executors as were in the legal exercise of their functions at the time of its promulgation, or those appointed afterwards. *Brown's executor v. Williams et al.*, 16 L. R. 344.

EXECUTORY PROCEEDINGS.

1. Where certain notes were given in payment of the price of property, which in the act of sale are indentified with the mortgage retained, and described as being to the order of C. H., but it is not stated that they were endorsed by C. H.: *held*, that the mortgagee or transferee cannot proceed by the executory process against the property, to enforce payment of the notes. The endorsement is a matter *in pais* of which the act furnishes no proof. *Dakin et al. v. Ganahl et al.*, 13 L. R. 512.

2. Where an act of pledge transfers to the pledgee all the pledgor's rights and interest to certain notes secured by mortgage, subrogating him to all his rights of proceeding by the executory process to enforce payment of the notes, the pledgee may have his order of seizure and sale in the same manner as the pledgor could have had. *Armstrongs v. Baldwin, syndic, &c.*, 13 L. R. 564.

3. In the executory proceedings against mortgaged property which has passed into the hands of a third possessor, *three days*, notice must in all such cases be given to the defendant, *after seizure*, before the property is advertised for sale. *Saillard v. White*, 14 L. R. 84.

4. When the vendor's act of sale and mortgage contains the clause *de non alienando*, there is no oath required, or notice to the third persons in proceeding against the mortgaged property by the *via executiva*. *Moss v. Collier*, 14 L. R. 133.

5. If the petition pursues the forms, and prays for an order of

seizure and sale, the fact of the clerk issuing a citation to the defendant, will not change the suit into the *via ordinaria*. *Moss v. Collier*, 14 L. R. 133.

6. When the seal of the Court is not affixed to the record of a judgment suit in another State, and the certificate of the clerk is irregular, it will not furnish sufficient authentic evidence to authorise the executory process to issue on it in this State. *Armstrong v. Levy et al.*, 14 L. R. 157.

7. Where the legality of an order of seizure and sale had been passed upon, in an opposition made by the defendant, the Court will take no further action in the matter, when brought up on a rule to show cause why an *alias* order of seizure and sale should not be set aside. *Florance v. Wilcox*, 14 L. R. 58.

8. An order of seizure and sale against a third possessor for a sum assumed, but the amount of which is left doubtful, will be set aside, and the party informed that his only remedy is by an ordinary suit. *Dupuy v. Dashiell*, 15 L. R. 124.

9. A supplemental petition for a new order of seizure and sale is admissible, if it do not alter the plaintiff's original demand, but is only a continuation of it, embracing instalments not due, when the first was filed. *Mader et ux. v. Fox*, 15 L. R. 132.

10. In computing the distance and notice of seizure to which the possessor of mortgaged property is entitled, when he lives more than twenty miles from the residence of the judge granting the order of seizure, the ordinary road used for travelling is to be taken, although there may be a shorter one but seldom travelled. *Woodward v. Dashiell*, 15 L. R. 184.

11. The want of amicable demand is not sufficient ground to enjoin proceedings on an order of seizure and sale. *Id.*

12. Where the third possessor assumes to pay the original vendor, he becomes the immediate debtor of the latter, who may proceed directly against him and the property, without notice to the original debtor. *Id.*

13. The law requires a demand of thirty days of the original debtor and mortgagor, whether it be his own notes or those he assumed to pay, before issuing executory process against the third possessor. *Valetti v. Gurlie*, 15 L. R. 188.

14. It is not sufficient in the executory proceedings to show that the notes which the debtor or mortgagor assumed to pay, have been protested, but that the debtor himself was in default, thirty days before proceeding against the third possessor. *Id.*

15. In an opposition arresting an order of seizure and sale, the issue is, as to the rights of the plaintiff, to proceed with his order of seizure, and not as respects the distribution of the proceeds of the property when sold; and especially among parties not before the Court. *Hozey, sheriff, &c. v. McDougal et al.*, 15 L. R. 353.

16. In the executory process, no copy of the petition is required

to be served on the defendant. A simple notice is necessary. *Exchange and Banking Company v. Walden*, 15 L. R. 431.

17. The article 739 of the Code of Practice points out the only reasons for which the sale, by the executory process of mortgaged property, may be arrested. *Id.*

18. Where the vendee and endorsers on notes secured by mortgage, are parties to the act of sale, it is not necessary that it be expressed therein, that they *endorsed* the notes, to enable the vendor to proceed by the executory process. *Barker, to use of Atchafalaya Bank v. Banks et al.*, 15 L. R. 453.

19. In the executory proceedings on an act of sale containing the pact *de non alienando*, against mortgaged property in the hands of the last-vendee, in which *no notice* is required, the latter is not bound to call his vendor in warranty. *Carter v. Caldwell*, 15 L. R. 471.

20. Where the defendant in an injunction staying executory proceedings, joins issue and prays for judgment for the amount of his debt, he thereby changes the proceedings from the *via executiva* to the *ordinaria*, and cannot have his injunction dissolved with damages so as to proceed with his executory process of seizure on his mortgage. *McMillin v. Carlin, curator, &c.*, 16 L. R. 100.

21. Where the notes are not *paraphed* and identified with a mortgage, yet if upon comparison of dates, and the notes having been executed according to the terms and conditions of the act of sale and mortgage, it is sufficient to support the executory proceeding. *Pepper et al. v. Dunlap*, 16 L. R. 163.

22. An order of seizure and sale is so far a judgment as to authorize an appeal; but it is not a good judgment in the true and legal sense of the term. *Harrod v. Woorhies' administratrix*, 16 L. R. 254.

23. A deed or mortgage executed before a justice of the peace, will not authorize an order of seizure and sale, as that officer is wholly unauthorized to pass such acts. *Id.*

24. The defendant complains with bad grace of credits allowed, in a petition for an order of seizure. If full credits are given, the seizure and sale will be allowed to proceed. *Armor v. Lewis*, 16 L. R. 331.

EXECUTRIX.

1. An executrix cannot be arrested on the opposition and affidavit of a creditor of the estate she administers, on the ground that she will leave the State before her account is homologated, and without leaving sufficient funds to pay his debt. *Mondelli v. Russell's executrix*, 17 L. R. 537.

FACTORS.

1. Factors and commission merchants cannot claim a lien or privilege on goods, moneys or property for a general balance of account against the owner, over an attaching creditor. *Gray, Durrive & Co. v. Bledsoe et al.*, 13 L. R. 489.

2. The only privilege a factor or commission merchant has, is expressly given by art. 3214 of the Louisiana Code, and is limited to specific advances made on goods consigned after they have come into his possession, or he has received a bill of lading, or letter of advice that they have been despatched to him. *Id.*

3. Where a merchant ordered a shipment of articles in Havana to his house in New-York, and was privy to selecting and making up the invoices, he cannot afterwards object to the quantity of any of the articles composing them. *Hernandez et al., v. Babcock's executors*, 13 L. R. 587.

4. So, if the shipper or factor furnished false invoices to the consignee for part of the cargo, with the privity of the buyer, when the true ones were sent with the bills of lading, it cannot affect the validity of the contract between the factor and buyer. *Id.*

5. A merchant ordered a shipment of colonial articles of produce from Havana to his house in New-York, and to draw on it for reimbursement. The factor or shipper consigned the cargo to a special agent, with directions not to deliver it to the consignees unless the bills were accepted, and their payment secured, but to sell it on his (i. e. the shipper's) *account*, and the cargo was thus sold *at a loss*: *held*, that the buyer was bound for the loss and charges, as his house neither accepted the bills or offered any security for their payment, when notified of the arrival of the goods. *Id.*

FACTORS AND COMMISSION MERCHANTS.

1. Where factors accept a mandate to receive produce and make Insurance on it at the instance of the shippers, they are bound to pay his draft on it, instead of imputing the proceeds to the payment of debts due them by the former owner. They can only apply the surplus of the proceeds of the cargo to their own debts after payment of the draft drawn against it. *Zacharie & Co. v. Rogers & Harrison*, 19 L. R. 223.

2. Where a commission is charged for *accepting*, none can be claimed, or a like commission charged for *advancing*, on the same sum or transaction. *Taylor, Gardiner & Co. v. Wooten*, 19 L. R. 518.

3. A promise by defendant to send plaintiffs his crop, or in default, to allow them a commission on its amount having no other

consideration than the acceptance of a draft, for which a commission is already charged and allowed, is *nudum pactum*, and will not be enforced. *Taylor, Gardiner & Co. v. Wooten*, 19 R. R. 518.

4. Where the owner of property places it in the hands of a third person who makes advances on it by drawing a bill, the drawee and consignee cannot appropriate it to the payment of his debt against the owner, until the advance is paid. *Zacharie & Co. v. Rogers & Harrison*, 19 L. R. 218.

FACTOR AND CONSIGNEE.

1. A factor or agent will not be liable for the loss on sales of the article consigned, if it appears from the evidence it was deteriorated when received, and that he acted with diligence and fidelity in the discharge of his trust. *Bogert & Kneeland v. Dorsey*, 14 L. R. 430.

2 The privilege given to factors in article 3214 of the Louisiana Code, is intended to aid the interests of commerce, and the word *advances*, used therein, is not to be restricted in its meaning to actual disbursements, but must be construed in an enlarged sense, with reference to commercial usage, and include acceptances not yet paid. *Turpin v. Reynolds, Hobson & Gooch, garnishees*, 14 L. R. 473.

3. So, where factors or commission merchants accepted drafts on the faith of the defendant's promise to ship and consign a certain quantity of cotton: *held*, that the consignees will hold the cotton so consigned against the attaching creditors of the defendant. *Id.*

4. Where cotton is shipped to factors, with instructions to lay out the proceeds in groceries, and if the purchases should exceed the amount, other cotton will be sent; they cannot hold the cotton in their possession subject to any balance on such purchases against attaching creditors. *Smith & Wright v. McCall et al.*, 14 L. R. 7.

FATHER AND CHILD.

1. One born in marriage will not be allowed to repudiate his own legitimacy. The right to repudiate or contest his legitimacy belongs to the father alone, and can only be exercised by him, or his heirs, within a fixed time and in certain cases if this right is expressly or tacitly renounced by the father, it is extinguished, and can never be exercised by any one. *Eloi v. Mader*, 1 R. R. 581.

2. The legitimacy of a child born in wedlock, cannot be affected by the declarations of the mother. She has no right to disown a child, for maternity is never uncertain, she can only contest its identity. *Id.*

3. The right to disavow a child (*action en désaveu*) is entirely distinct and different from that, which all parties, whose interest may be affected, have to contest the legitimacy (*contestation de légitimité*) of one in whose favor the legal presumption does not exist. *Eloi v. Mader*, 1 R. R. 581.

4. Illegitimate children, though duly acknowledged, have no claim against the estate of their natural father, except for alimony. C. C. 224, 257, 913. *Liautaud v. Baptiste*, 3 R. R. 441.

5. The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions, previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556. *Id.*

FERRIES.

1. The power of establishing ferries is now vested in the Police Juries of the several parishes. *Hebert, treasurer, &c. v. Maillan et al.*, 16 L. R. 585.

2. The power of establishing ferries by the Police Jury in the several parishes, is *sufficient* for all the inhabitants, whether of a town adjacent to a stream or any others, to cross the streams which border on them; so, the town council have not this power. *Id.*

3. The corporation of the town of Plaquemine, having no express or implied authority to establish a ferry across a stream bordering on it, the exercise of such act is illegal; this power, under a general law, belongs exclusively to the Police Jury. *City Council of Plaquemine v. Decaudine et al.*, 16 L. R. 588.

FIERI FACIAS.

1. Where a sheriff is in possession of property seized under execution, he must be considered a rightful possessor holding for the benefit of the plaintiff, until it is clearly shown that the property seized belongs to another than the defendant from whom it was taken. *Wafer v. Pratt, sheriff, and another*, 1 R. R. 41.

2. The right of a third person to oppose an execution, is limited to the cases in which he owns, or has a privilege on the property seized; and in the former case he must make out a clear title in order to arrest the sale. *Id.*

3. Where the amount made under a *fieri facias* has been paid by the sheriff to the plaintiff in execution, before notice of the purchase of the claim to the proceeds by a third person at a forced sale, he

will not be responsible to the latter. *Donohue v. Harding, sheriff*, 1 R. R. 69.

4. Notice to a sheriff by a third person, not to pay over money made under an execution to the plaintiff, will not render him liable, if given before the execution came into his hands. *Id.*

5. A sheriff who has levied an execution against one person on the property of another, will not be protected on an allegation that he acted to the best of his knowledge in the discharge of his duty as an officer. He must take care not to seize the property of A on a writ against B. *Barney v. De 'Russy, sheriff, and others*, 1 R. R. 75.

6. The purchaser of property sold under a *feri facias* subject to a previous mortgage, will be responsible only for the amount of such mortgage, and any surplus he may have bid above that amount. And where such previous mortgage is revoked so far as a third person is concerned, and his claim declared to have precedence on the proceeds of the mortgaged property, the amount due from the purchaser on account of the mortgage, will be first applied to the settlement of that claim, and the balance only will belong to the holder of the mortgage. *Oliver and others v. Stevens, sheriff, and another*, 1 R. R. 86.

7. A sale of property under execution on a judgment from which no suspensive appeal has been taken, will divest the title of the owner, though the judgment be afterwards reversed. *Williams v. Gallien*, 1 R. R. 94.

8. A sale of property by the sheriff under an execution, after the judgment has been satisfied, will give no title. *Id.*

9. Where a judgment has been rendered in favor of the plaintiff, the whole judgment, including the costs, is his property. He is supposed to have advanced, or to be liable for the costs; and the sheriff has no right, in violation of the orders of the plaintiff or his attorney, to sell the property seized, in order to secure their payment. Such a sale will be void. *Id.*

10. The right given by article 686 of the Code of Practice, to a creditor having a privilege or special mortgage on property seized for a debt of which all the instalments are not due, of causing the whole property to be sold on terms of credit corresponding with the periods at which such instalments are payable, results from the principle that every part of the property is mortgaged for the whole of the debt, the holders of the different instalments secured by the same mortgage being entitled to participate in the distribution of the proceeds. But it does not follow that the mortgagor, who is bound for the whole debt, notwithstanding the insufficiency of the property mortgaged, can, in an action by the holder of a note for the instalment already due, claim as a right that the property should be sold on such terms, especially when the proceeding is by an ordinary action. *Florance v. Orleans Navigation Company*, 1 R. R. 224.

11. Bail are not entitled to notice of a *fieri facias*, issued against their principal. *Valentine v. Christie*, 1 R. R. 298.

12. Where property offered for sale under execution is mortgaged to secure the payment of notes, not yet due, with the accruing interest, the purchaser must retain in his hands enough to pay such notes, with interest to the day of sale, not to the period of the maturity of the notes. *Firemen's Insurance Company of New-Orleans v. Gillingham and others*, 1 R. R. 305.

13. A steamer having been seized and advertised for sale by the marshal of the City Court of New-Orleans, under several executions issued on judgments obtained in the Court and in the Courts of the associate judges, a creditor who had obtained a judgment against the boat in the District Court of the United States, paid to the marshal the full amount of all the executions in his hands, with the costs, in order to release it from seizure, and place it in the possession of the marshal of the United States under his judgment, notifying the marshal of the City Court at the time, that his claim on the boat was a privilege of higher order than those of the judgment creditors at whose suit it was seized. On a rule by one of the latter to show cause why his claim should not be paid by privilege out of the funds in the hands of the City Marshal, the creditor who had obtained a judgment in the United States Court, having intervened, and claimed to be paid by preference over all the other creditors. *Held*, that the boat not having been sold, and the payment to the City Marshal having been made avowedly to release it from seizure, and to enable the Marshal of the United States to take possession and sell, thus depriving the original seizing creditors of their recourse against the boat, the payment to the City Marshal must be regarded as a satisfaction of the executions in his hands, and the amount be distributed among the several seizing creditors in proportion to their respective judgments. *Buckley v. McCloskey and others*, 1 R. R. 312.

14. Where the sheriff neglects to publish the advertisements, required by law, on the sale of property under execution, the title of the debtor will not be divested. *Bourg and others v. Monginot and others*, 1 R. R. 331.

15. The prescription of five years, established by the act passed the 10th of March, 1834, and promulgated the 28th of April following, in favor of purchasers at public sales, runs from the day of sale; but where the sale was made before the passage of the act, prescription must be reckoned from the day of its promulgation. *Id.*

16. A bond taken in the name of the sheriff, on a sale, under execution, at twelve months' credit, is for the benefit of judgment creditors; hence the law requires, if there be several such creditors, that as many bonds be taken as may be necessary to deliver to each party his just portion of the price. These bonds should be made out in the names of the different parties, among whom the

price is to be divided. *Burthe and another v. Bernard*, 1 R. R. 395.

17. Where a single bond was taken, in the name of the sheriff, on a sale, under execution, at twelve months' credit, for the whole price of the property, which was sold free from all incumbrances, it represents the whole price, and belongs to the several parties interested, according to their rights in the property itself. *Id.*

18. A bond taken in the sheriff's name, on a sale under execution, at twelve months' credit, is in his hands only as a deposit. He has no property in it, which he can transfer to any other person than the party for whose benefit it was taken. Where such a bond has been assigned to a third person, the parties entitled to it will have the same remedies against the assignee, as against the sheriff, had he retained it and received the amount. *Id.*

19. The recorder of mortgages, having erased plaintiff's mortgage, without his consent; and the sheriff having sold the land, seized at the suit of the plaintiff, at twelve months' credit, and assigned to a third person the bond taken for the price. *Held*, that plaintiff may look to the recorder of mortgages for indemnity, or to the proceeds of the sale, in the hands of such third person, at his pleasure. *Id.*

20. A salary for personal service, not yet due, cannot be seized under execution. *Allen v. Arnouil*, 1 R. R. 399.

21. To entitle the vendor, under art. 2591 of the Civil Code, to consider as null an adjudication of property, offered for sale for endorsed notes, the purchaser must be put in default by being required to name his endorser. *Perkins v. Dickson, tutor*, 1 R. R. 413.

22. Parole evidence is admissible to prove what occurred at the time of a judicial sale, or subsequently, in relation to a compliance with the terms of the sale. *Id.*

23. A *fieri facias* may be issued while a debtor is imprisoned, or within the limits under a *capias ad satisfaciendum*. *Comstock and another v. Créon*, 1 R. R. 528.

24. A debtor arrested on a *capias ad satisfaciendum*, having given security to keep the prison limits, the plaintiff on discovering property, took out a *fieri facias*, and seized it, whereupon, the debtor made a voluntary surrender for the benefit of his creditors, which was accepted by the judge, and on the same day broke the limits; when, all proceedings having been arrested, the *fieri facias* was returned; on the opposition of plaintiff, the surrender was rejected; and the latter, having abandoned his *fieri facias*, sued the security on his bond. *Held*, that the *fieri facias* was legally issued, and gave a lien on the property; that the surrender having been set aside, the plaintiff might have proceeded to make his money; and that by neglecting to do so, the surety was released. *Id.*

25. A mortgage creditor, who buys the property subject to his mortgage, cannot be compelled to pay the purchase money, which

he is entitled to receive by preference. *Rodriguez, syndic, v. Du-bertrand and another*, 1 R. R. 535.

26. Where property has been seized under a *feri facias* before the return day, the sheriff is not obliged to return the writ at any particular time, unless he has sold the property; where the property has not been sold, he may finish what he has commenced, though the return day have expired. *Black v. Catlett and another*, 1 R. R. 540.

27. Where a *feri facias* under which property has been seized, is ordered by the plaintiff to be returned into Court before the property is sold, the proceeding under the writ will be considered to have been abandoned by the plaintiff, the sheriff will be released from any obligation to keep the property and the defendant may demand its restoration. To enable the plaintiff to sell the property, an *alias feri facias* must be issued, a new seizure be made, and new notice be given. *Id.*

28. Article 641 of the Code of Practice, exempting the tools and instruments necessary for the exercise of the trade or profession of the debtor from seizure, was intended to encourage such useful trades and professions, by enabling the debtor to sustain himself and family by his own industry, and to hold out to the creditor the prospect of satisfaction from the future labor of his debtor; and in the cases to which it applies, will exempt the books of professional men from seizure. But where the debtor resides abroad, or has absconded, or permanently left the State, his linen, clothes, bed, arms, and the tools and instruments of his trade or profession, may be seized and sold for the payment of his debts. *Lambeth v. Milton*, 2 R. R. 81.

29. Ground, comprising several squares in the city of New-Orleans was mortgaged to plaintiff, and described in the act according to the plan of the city as it existed at the time. By subsequent proceedings of the municipal authorities, the names of the streets, and numbers and bounderies of the squares were changed: *held*, that the advertisement of the property to be sold according to the old plan, was no cause to rescind the order of seizure and sale; and that the alterations made by the municipal authorities were matters of public notoriety. *Clement v. Oakey*, 2 R. R. 90.

30. The provision requiring that, in forced sales for cash, the property shall bring two-thirds of its appraised value, was intended for the protection of the debtor, whose property might otherwise be sacrificed. *Egerton, &c. v. their creditors*, 2 R. R. 201.

31. The members of a commercial partnership have each the right to represent the firm. But where it is attempted to satisfy a judgment against the partnership out of the individual property of a member, he alone can waive the formalities required by law for its alienation. In such a case, a partner has no more authority than a stranger. *Byrne v. Hooper*, 2 R. R. 229.

32. Where property is ordered to be sold for cash to satisfy the

claim of a plaintiff, who, after the adjudication, agrees to allow the debtor time for the payment of the amount of his bid, and informs the sheriff that the arrangement is satisfactory to him, the officer is bound to convey the property to the purchaser, as if the amount had been paid in conformity to the terms of the adjudication. *Gallier v. Garcia*, 2 R. R. 319.

33. Article 2589 of the Civil Code, relative to sales *à la folle enchère*, does not apply to those made by a sheriff under writs, issuing on final judgments. In the latter, if the price be not immediately paid, where the sale is for cash, or if the proper surety be not given at once, when on credit, the sheriff must proceed forthwith, under art. 689 of the Code of Practice, to sell the property anew. If he give any delay, it is at his own risk, and he will be responsible in damages to the plaintiff. *Id.*

34. Where property has been seized under a *fi. fa.* the sheriff may proceed to sell, though the return day has passed, or the writ itself has been returned into Court; and payment to the sheriff, under such circumstances, for the purpose of liberating the property seized, will discharge the debt. *Byrne v. Taylor*, 2 R. R. 341.

35. Judgment against an insurance company, and execution returned unsatisfied. Under the 13th section of the act of 20 March, 1839, plaintiffs interrogated the appellants, who admitted that they were stockholders in the company. It was proved that the latter were responsible for a balance due on their shares of stock, which was liable to be called in by the directors, *held*, that plaintiffs might exercise against the appellants, all the rights which the defendants could have exercised against them; and that, the amount of plaintiff's claim being less than that which appellants were liable to be called on to pay on their stock, the former were entitled to an execution against them. *Cucullu v. Union Insurance Co.*, 2 R. R. 571.

36. No particular form is prescribed by law for a warrant or execution, on behalf of the State, against a delinquent tax collector. A writ signed by the Treasurer, commanding the proper officer, in the name of the State of Louisiana, is a sufficient compliance with the provision of section 6, art. 4, of the State constitution, in regard to the style of process. *Scarborough v. Stevens*, 3 R. R. 147.

37. One who has paid the debt due to a plaintiff, and been expressly subrogated to his rights, may take out executions against the defendant. *King v. Dwight*, 3 R. R. 2.

38. A second *fi. fa.* cannot be issued on a judgment, until the first is returned. *State v. Judge of Probates of St. Tammany*, 3 R. R. 355.

39. Where sufficient property could not be found, or has not been seized to satisfy an execution, a further seizure may be made when the deficiency is discovered, or other property found. Where more property has been seized than sufficient, the remedy is pointed out by art. 652 and 653 of the Code of Practice. Such an over

seizure will not authorize an injunction. *Dabbs v. Hemkew*, 3 R. R. 123.

40. Under a judgment against a husband and wife, *in solido*, the sheriff may levy on the separate property of either. *Smallwood v. Pratt*, 3 R. R. 132.

41. Under art. 647 of the Code of Practice, the undivided share of an heir in a succession, may be seized and sold under execution. *Noble v. Nettles*, 3 R. R. 152.

42. It is not necessary that it should be shown that any attempt has been made to seize moveables, immoveables, or slaves, before seizing the rights and credits of the debtor. The property must be pointed out by the latter, or, under art. 649 of the Code of Practice, by allowing the sheriff to execute the writ, without exercising his right of pointing out the property to be seized, he will lose it. *Id.*

43. Plaintiffs having obtained a judgment against the defendants, seized, under a *fi. fa.*, all the rights, credits, money, and other property of defendants, in the hands, or under the control of the receiver of public moneys at New-Orleans. A draft from the commissioner of the general land-office on the receiver, in favor of one of the defendants, was presented for payment after the seizure, which was not accepted, there not being, at the time, sufficient funds in the hands of the receiver. The draft was subsequently given up by the holder, and the instructions to pay it revoked. On a rule on the receiver, to show cause why he should not pay over the money in his hands belonging to defendant. *Held*, that the receiver had no funds belonging to the defendant; that the money belonged to the United States, and until paid over remained under the control of the government: that the mere order to pay, did not, of itself, transfer to the defendant any money in the hands of the receiver, but was, at most, only an acknowledgement of the debt. *Mechanics' and Traders' Bank of New-Orleans v. Hodge*, 3 R. R. 373.

44. A rule cannot be taken out on an officer of the United States, in his official capacity, to show cause why he should not pay over money, seized in his hands under a *fi. fa.*, as the property of a third person. To condemn him to pay as an officer, would be to condemn the government, which cannot be done. *Id.*

45. Under art. 722 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immoveable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless. *Campbell v. his creditors*, 3 R. R. 106.

46. Art. 301 of the Code of Practice, which declares that the sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person

oppose such payment, alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into Court, to be distributed among all the creditors of the defendants according to the order of their respective privileges or hypothecations, makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditors. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure. *Campbell v. his creditors*, 3 R. R. 106.

47. The circumstance that the sale of property seized under execution was advertised before expiration of the three days allowed for notice of the seizure, is immaterial. *Dabbs v. Hemken*, 3 R. R. 123.

48. A slight variance between the description of the property in the advertisement, and that in the notice of the seizure, which cannot mislead the debtor, is immaterial. *Dabbs v. Hemken, rehearing*, 3 R. R. 129.

49. The second section of the act of 20th March, 1816, requires that the property of a delinquent sheriff, which has been seized under execution issued by the Treasurer of the State, shall be sold for cash and without appraisement. *Scarborough v. Stevens*, 3 R. R. 147.

50. The purchaser of property sold under a *fi. fa.* on twelve months' credit, having offered defendants' testator to the sheriff as security for the price, received a blank bond from the sheriff to be signed by himself and the testator, and filled up on his return. The bond was signed, but not returned to the sheriff, till after the death of the surety, which happened a few days after he signed the instrument when it was filed up. *Held*, that the security having been previously approved by the sheriff, the contract was complete by the signature of the former. *Wells v. Moore*, 3 R. R. 156.

51. In a sale under execution, on a twelve months' credit, the sheriff is the agent of the party for whose benefit the sale is made, in taking bond from a purchaser. He is liable to the former if he accept insufficient, and to the latter if he refuse sufficient surety; and is, therefore, the proper judge of its sufficiency. *Id.*

52. The provisions of articles 697 and 698 of the Code of Practice requiring the sheriff to cause the act of sale executed by him for property sold under a *fi. fa.*, to be recorded in the office of the clerk of the Court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal nor in any way modify the act of 24th March, 1810, which declares, sect. 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the parish judge of the parish in which it is situated; nor that of 26th March, 1813, providing, sect. 1, that sales of land or slaves, under execution, shall, except be-

tween the parties, be void unless so recorded. *Lee v. Darramon*, 3 R. R. 160.

53. Where the sheriff's deed for immoveable property sold under a *fi. fa.* subject to a previous mortgage, has not been recorded in the office of the parish judge of the parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Id.*

54. A sheriff has the right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside, *Bayon v. Breedlove*, 3 R. R. 383.

55. Where different seizures have been made in the hands of defendant, of whatever sums may be due by him to plaintiff, on a judgment in favor of the latter, execution will be stayed until the seizures are proved to have been satisfied or abandoned. No law authorizes a judgment ordering the amount to be deposited in Court, subject to the claims of the seizing creditors. *Righter v. Slidell*, 3 R. R. 375.

FOREIGN LAWS.

1. In the absence of all evidence, the laws of another State will be presumed to be the same as our own. But where the law is shown to have been the same, the repeal of the law in this State, will not authorize the assumption that it has also been repealed in the other; such repeal, if it exist, must be proved by the party interested to establish it. *Exparte Lafonta*, 2 R. R. 495.

2. Foreign laws must be proved as facts. In the absence of proof of what they are, our own laws must govern. *Bonneau v. Poydras*, 2 R. R. 1.

FRAUD.

1. Where fraud is charged, direct and positive evidence is seldom to be obtained. Circumstantial evidence is commonly all that can be had; and every circumstance becomes material to ferret out the fraud. *Cecile, f. m. c. v. St. Denis, f. w. c.*, 14 L. R. 184.

2. A sale having all the forms of a legal and authentic act cannot be treated as a nullity, even if *fraud* is alleged. The fraud must be shown in a direct action. *Burland v. Carrollton Bank*, 14 L. R. 189.

3. A party suffering from the fraud of another, is entitled to relief; and where fraud would vitiate a sale of goods as between the original parties, a third party, on whose credit they were purcha-

sed and assumed payment, should not be made the victim of the fraudulent acts of the purchaser. *St. John et al. v. Sanderson; Cochran intervenor*, 15 L. R. 346.

4. In questions of fraud which are particularly the province of a jury, their verdict must be conclusive, unless clearly against the evidence. *Passebon v. his creditors*, 15 L. R. 438.

FRAUD AND SIMULATION.

1. Where land is alleged to have been conveyed with a view to give the vendee an apparent title, to enable him to recover in a petitory action; that the vendors were to have one-half when recovered; and that no price was really paid; such a stipulation can only be shown by a counter-letter. *Delahoussaye's heirs v. Davis's widow and heirs*, 19 L. R. 409.

2. A simulation not fraudulent cannot be proved by parole, as between the parties; and if fraudulent as to both parties, the law gives no action to enforce such contracts. *Id.*

FREEDOM.

1. In a suit for freedom by a person of color held as a slave in good faith and under a just title, proof that he had served as a seaman in a ship of war belonging to the United States for several years, that he had always passed for a free person, and that none other were ever received on such vessels, will not be sufficient; he must establish his freedom by positive proof. *Jackson v. Bridges' heirs*, 1 R. R. 172.

FREIGHTS AND VESSELS.

1. The freighters of a vessel on the charter party, have no claim on the owner for damages, alleged to have been occasioned by the accidents, &c., of the voyage. There is no privity between the freighters, who contract with the charterers, and the owner. *Agricultural Bank of Mississippi v. Barque Jane*. 19 L. R. 1.

2. The payment of privileged claims against a vessel, does not subrogate the persons paying, as privileged creditors, when there is no conventional subrogation. *Id.*

3. The master of a vessel, even under charter party, is bound to consult the owner, in the home port, when necessary for extensive repairs are to be made. *Id.*

FRUITS AND REVENUES.

1. In a separate action to recover the fruits and revenues after eviction and the defendant pleads the price of the improvements or enhanced value of the land in compensation and reconvention, he cannot afterwards plead that these matters were decided in the suit evicting him. *Pearce et al. v. Frantum*, 16 L. R. 414.

2. Under the Civil Code of 1808, the party evicted, who was even in good faith, was bound to restore the fruits which he had reaped after the demand or institution of suit. *Id.*

3. Where a party has been in the peaceable possession of land without title, in the hope of getting a pre-emption right, he will not be liable to account for rents and profits previously to the inception of the suit evicting him. *Id.*

4. The right of the party evicted, to be paid the value of his improvements, rests on the broad principles of equity, that no man ought to enrich himself at the expense of another. *Id.*

5. The possession of more than a year, suffices to give the possessor a right to be maintained in his possession, until a better right is shown; and that he makes the fruits his own before judicial demand. *Pearce et al. v. Frantum*, 16 L. R. 423.

6. The Spanish law provided, that whether the party evicted, possessed in good or bad faith, he was not bound to deliver up the premises to the owner until he shall have been paid for the expenses incurred on account of them. *Id.*

7. So, the possessor in bad faith, may claim in offset of rents, or fruits and revenues which he is condemned to pay, the enhanced value which his improvements added to the property. *Id.*

8. The son may become the owner of his father's improvements, and after eviction, be entitled to pay for them, as an offset to the fruits and revenues. The right to be paid for useful improvements is a real right, and the party evicted may retain possession until he is remunerated. *Id.*

GARNISHEES.

1. The refusal or failure of garnishees to answer interrogatories concerning property of the defendant attached in their hands, is to be taken as a legal confession of sufficient property in their possession to satisfy the attachment, and to bring the defendant into Court. *Parmely et al. v. Bradbury*, 13 L. R. 351.

2. The law does not require an order of Court to the garnishee directing him to answer interrogatories; the service of a copy of the petition containing the interrogatories and citation, are a sufficient warning for him to answer. *Id.*

3. Where garnishees were asked if they had property of the

defendant in their possession, and whether it was worth a *certain sum*, and they answered categorically, *yes, one hundred and four bales of cotton: held*, that they could show, when called on by the plaintiff to pay the proceeds over in satisfaction of his judgment against the defendant, that the cotton was previously attached in their hands at the suit of other creditors. *Robeson et al. v. Mississippi and Alabama Rail Road Company et al.*, 13 L. R. 465.

4. Eustis J., dissenting. Where garnishees, by their answer, acknowledge that they have property in their possession belonging to the defendant sufficient to satisfy the plaintiff's debt, they should not be allowed afterwards to defeat this acknowledgement, when called on to pay the plaintiff's judgment, by pleading that the property had been *previously* attached. *Rebeson et al. v. Mississippi and Alabama Rail Road Co. et al.*, 13 L. R. 466.

5. On an appeal from an order making a rule absolute, requiring garnishees to pay money and effects due by them to the defendant over to the sheriff, subject to the order of Court: *held*, that no answer to the rule in writing is required. Their liability is to be tested by their answer to interrogatories. *Oakey et al. v. Mississippi and Alabama Rail Road Co. et al.*, 13 L. R. 567.

6. An attaching creditor cannot compel the garnishee to pay a debt due by him, as such, into Court, even after judgment against the defendant. *Id.*

7. The order in which previous attachments are to be paid, must be first ascertained before the last attaching creditor can obtain judgment against the garnishee. *Id.*

8. A garnishee has no right, as such, to plead for any of the parties litigating for the property in his hands. He is viewed as a stake holder, whose duty it is to declare the truth; and if his declaration be controverted, to support it, and prevent any improper decision to his prejudice. *Kimball et al. v. Plant*, 14 L. R. 511.

9. A garnishee cannot withhold funds claimed by intervenors, whose claim is dismissed and pending on appeal. It does not suspend the execution of the plaintiff's judgment against the defendant and original debtor, in which the funds were attached. *Carman et al. v. Anderson et al.: Bogart garnishee*, 15 L. R. 136.

10. When judgment has been rendered against the defendant, proceedings may be immediately had against the garnishees to pay over the funds or effects even before final judgment is signed. *Burke, Watt & Co. v. Taylor: N. & E. Ford & Co., garnishees*, 15 L. R. 236.

11. If the answers of garnishees state facts which the plaintiffs attempt to disprove, it is a proper case for a jury; but when the question is entirely one of law, relating to the sufficiency of the answers and the legal inferences deducible from them, the Court will decide. *Id.*

12. The promise of garnishees to pay the defendant's drafts or bills, can give them no privilege on any funds of his coming into

their hands, over third persons or attaching creditors, who seize them before actual payment; and if they subsequently pay them, they cannot plead compensation to the vested rights of attaching creditors. *Burke, Watt & Co. v. Taylor: N. & E. Ford & Co., garnishees*, 15 L. R. 236.

13. Garnishees may show, when called on to pay, that the defendant sued as absent, was in fact dead at or before the institution of the suit and that, consequently, a payment by the garnishees would not be valid. *Allard v. De Brot: Merle & Co. garnishees*, 15 L. R. 253.

14. Where judgment is entered, against the defendant to be satisfied to the amount of \$645 out of the funds attached in the hands of the garnishee, it is considered a final judgment as to the garnishee, on which execution may issue against him. *Kirkman et al. v. Hills*, 16 L. R. 523.

15. A garnishee may be arrested and held to bail under a judgment against him and the defendant; and after a return of *fi. fa.* and *capias*, not found, &c., the bail may still surrender him at any time before a judgment fixing his responsibility as bail. *Id.*

16. Where the answers of a garnishee are not explicit or responsive to the interrogatories, on his failure to make proper answers, the interrogatories will be taken for confessed, and the garnishee held liable for the defendant's debt. *Hart & Merritt v. Dahlgreen & Co.*, 16 L. R. 559.

17. The service of a supplemental petition with citation is insufficient to bring the garnishees before the Court when there has been no service of the original petition on them. *Lovell et al. v. Cartwright*, 17 L. R. 547.

18. Until garnishees are served with a copy of both the original and supplemental petitions they are not required to answer interrogatories and consequently these cannot be taken as confessed. *Id.*

19. Second garnishees are entitled to have the amount attached in the hands of the first ones deducted from the amount claimed, and are only liable for the remainder. *Id.*

20. Where garnishees are in possession of a slave, transferred to them in Mississippi by the surviving partner, in payment of a debt due by the firm, they will hold it against an attaching creditor of a new firm, of which this partner is a member. *Powell v. Aikin & Gwinn et al.*, 18 L. R. 321.

21. A garnishee has no right to interfere with the merits of the case between the plaintiff and defendant. *Lee & Hardy v. Palmer et al.*, 18 L. R. 405.

22. When the plaintiff obtains judgment against the defendant, all that is required is to obtain an order on the garnishees to pay over the funds of the defendant in their hands. *Id.*

23. The disclosure of the time of receiving and paying over certain monies by an attorney, who is garnishee, which he had received on account of his client, cannot be objected to as disclos-

ing professional secrets. *Comstock et al. v. Paie & Smith, &c.*, 18 L. R. 479.

24. So where the attorney, when cited as a garnishee to answer interrogatories, requiring him to state, if he had not received certain money of his client, and if he had, and had paid it over to state when he paid it, and to whom: and he refused to answer, on the ground that he would be disclosing professional confidence: *held*, that he was bound to answer, and his *refusal* was an *evasion*, making him liable for the whole debt, costs and damages. *Id.*

25. The rights of garnishees and their liability to pay, does not depend on privileges or preferences, but on their answers to the interrogatories propounded by the plaintiffs; subject however to be disproved. *Blanchard v. Vargas et al.*, 18 L. R. 486.

26. Where the garnishees, answer stated he had a certain amount of defendant's property in his possession, upon paying him \$468, he will be entitled to retain this sum, when his answer is not disproved. *Id.*

27. An order on a garnishee, to pay over a certain portion of a claim in money when collected, arising from certain notes in his hands, does not affect the notes not yet collected. They still remain the property of the original owner and are liable to attachment by any of his creditors. *Branch Bank of Alabama v. Kraft et al.*, 18 L. R. 565.

GUARANTY.

1. Where one guaranties the payment of an existing debt, the obligation he contracts is essentially one of suretyship, in whatever form of words it may be clothed. *Gasquet et al. v. Thorn*, 14 L. R. 506.

2. So, whatever may be the character of the primitive obligation, whether an endorsement or other commercial engagement, the guarantor's accessory obligation does not partake of its commercial character, but is absolute if the debt is not paid. *Id.*

3. The guarantor of a note, endorsed by another, is not entitled to notice of protest in order to render him liable. *Id.*

4. Contracts of guaranty of existing debts entered into in this State, are to be construed in reference to the municipal law or Louisiana Code, and are not regulated by the *lex mercatoria*. *Id.*

5. So, in this case, the defendant guarantied the payment of a note, and became the surety of the makers, although it does not appear that the latter were acquainted with his engagement. *Id.*

6. The defendant as guarantor cannot claim to be discharged from liability by the neglect of the plaintiff to give notice of a demand and non-payment. *Id.*

7. Where guarantors receive no notice of the acceptance of the guaranty, or of the various advances made on bills drawn on it, un-

til after their dishonor, they are discharged by the *laches* of the holders. *Bank of Illinois v. Sloo & Byrne et al.*, 16 L. R. 539.

8. It is the duty of creditors or holders of bills drawn under guaranty, within a reasonable time after the advances are actually made, to give notice thereof to the guarantors, informing them that reliance is placed on their guaranty, to insure re-payment. *Id.*

9. A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit or make advances on it or not. *Id.*

10. Acceptors of bills of exchange drawn on their letter of credit, addressed to the payees or purchasers of the bills, are absolute acceptors and not guarantors. *Id.*

HABEAS CORPUS.

1. No appeal lies from proceedings had on a *habeas corpus* in a criminal case, or for detention in disobedience to police regulations, and the like cases. *State of Louisiana v. Judge of Commercial Court*, 15 L. R. 192.

2. Civil cases are essentially those in which the defendant, or party against whom relief is sought by *habeas corpus*, is a natural person or corporation other than the State. *Id.*

HEIRS.

1. In an action for a partition, a former judgment fixing the rank and portion of each heir, inheriting a succession, is *res judicata* when not appealed from; and no one of them can be deprived of his share in the suit for the partition. *Hooke v. Hooke et al.*, 14 L. R. 22.

2. Where two out of six heirs of the whole blood die, after the inheritance is fixed, and there is an heir of the half blood, she will inherit one tenth of the succession of their common mother. *Id.*

3. If the heir is born and resides in Louisiana, and there is real property situated here, which is sold to effect a partition, the proceeds are considered *realty*, and will descend as such according to our laws. *Id.*

4. Heirs who are of age and parties to a provisional partition, cannot complain; but minors and co-heirs not made parties, are not concluded, and their portions in a final partition, ought to be made up to them, according to the principles of equity. *Kemp v. Kemp et al.*, 15 L. R. 517.

5. The proceedings in the Probate Court, where the succession of the deceased was administered, recognizing the heir, together

with the testimony of witnesses well acquainted with the family, are sufficient to authorize the heir to sue and maintain an action in his own name, for debts owing the succession. *Addison v. New-Orleans Savings Bank*, 15 L. R. 527.

6. The lawful heir inherits the succession from the moment it is opened, and this right is acquired by the operation of law alone, before he has taken any steps to put himself in possession. *Id.*

7. One of the effects of the right of the heir to a succession, is to authorize him to institute all the actions which the deceased had a right to, and to prosecute those already commenced. *Id.*

8. The absence of heirs will not be *presumed* in all cases of an intestate succession, and less so in a case where the contrary is shown. *Id.*

9. A substitution of heirs to take effect at the death of the *gravatus*, or at an uncertain time, is to be considered conditional, and can only take effect on the happening of the event on which the condition depends. *Bernard's heirs v. Goldenbow*, 18 L. R. 95.

10. Where the husband and wife institute the survivor of them *sole heir*, with condition and substitution, that at the death of the survivor, the property then existing, shall go to each of their heirs in certain proportions, it does not inhibit the survivor, while living, from *alienating* the property. *Id.*

11. The rights of the heirs of either of the spouses did not vest on the death of one of them, and could not, until the decease of the survivor: they acquired only an eventual right or hope. *Bernard's heirs v. Soulé*, 18 L. R. 21.

12. The legitimate daughter will inherit the property of her deceased mother to the exclusion of an illegitimate son, not born in wedlock. *German et al. v. Nicholls et al.*, 18 L. R. 361.

13. The beneficiary heirs are first entitled to be appointed dative testamentary executors, when none are named in the will; and the legal heirs being entitled to the benefit of inventory, the estate must be administered under such benefit, and according to the rules provided for the administration of such successions. *Girod's heirs and legatees v. Girod's executors*, 18 L. R. 394.

14. Where beneficiary heirs are appointed dative testamentary executors to a succession administered with the benefit of inventory, they are required to give security in the same manner as curators of vacant estates. *Id.*

HIRED LABORERS.

1. Where a laborer hired for a certain time, is discharged by his employer before the time for which he was engaged has expired, without any serious ground of complain, he will be entitled, under art. 2720 of the Civil Code, to the whole amount of wages he might

have claimed had the full term of his service arrived. This right accrues as soon as he is discharged; and the fact that he engaged his services immediately after to another employer, for the remainder of the term, cannot affect his right to recover the full amount from his first employer. But art. 2720 speaks only of the wages due to the laborer, and should not be extended to any thing else, as to an allowance for board, lodging, &c. *Shea v. Schlatre*, 1 R. R. 319.

2. Drunkenness in a laborer, hired for a certain term, is a sufficient cause of dismissal, without any stipulation to that effect in the contract. *Nolan v. Danks and another*, 1 R. R. 332.

3. A laborer, discharged by his employer, for good cause, before the expiration of his term of service, is entitled to recover his wages up to the time of his discharge. Art. 2719 of the Civil Code, which provides that the laborer may leave his employer, or the employer may discharge his laborer, for good cause, before the expiration of the term of service, pronounces no forfeiture against the party giving the other just cause of complaint. *Id.*

4. Art. 3499 of the Civil Code, which prescribes the action of workmen and laborers for their wages after one year does not apply to an action by workmen, for specific work, done under a written contract. *Townsend and another v. Caldwell*, 1 R. R. 433.

HUSBAND AND WIFE.

1. The power of the husband over the wife, and her capacity to sue, ratify or make a contract, is fixed by the law of their domicile. So, where a married woman residing in France, and separated in bed and board from her husband, seeks to annul a transaction made by her agent in Louisiana, on the ground that she was unauthorised to cause it to be made: *held*, that the controversy must be determined by the laws of France and not those of Louisiana, where she seeks to enforce her legal rights. *Garnier v. Poydras*, 13 L. R. 177.

2. A transaction entered into by a woman separated in property from her husband, in order to be binding and valid, under the laws of France, an authorization from the Court or her husband is necessary. *Id.*

3. In France a separation from bed and board produces the same civil effects as to the wife, as a separation in property; and in both cases her *incapacity* to contract, without the necessary authorization, or voluntarily to execute an unauthorised contract, continues until the dissolution of the marriage. *Id.*

4. According to the laws of France, a separation from bed and board *disables* the wife from contracting, suing or ratifying a contract without the special *authorization* of the Court or her hus.

band ; and this authorization must be special or clearly result from some act in writing for *all acts done* or to be done. *Garnier v. Poydras*, 13 L. R. 177.

5. Proof of authorization under which the wife was proceeding in her suit, being insufficient, and the defendant having the right to a final decision of the case on the merits, the Court instead of non-suiting the plaintiff, remanded the cause for a new trial, and for both parties to make new proofs. *Id.*

6. Eustis J., dissenting. Was of opinion that judgment of non-suit ought to be entered, as the plaintiff would not be bound by a judgment against her ; and it was unjust to allow her to litigate her rights without being bound by a decision which might be rendered adversely to them. *Id.*

7. A separation from bed and board by the tribunals of France, does not remove the wife's incapacity to sue without the authorization of her husband. *Rapp v. Peyroux*, 13 L. R. 218.

8. Where the wife directs her husband to sell her property to pay the children of her first marriage, and she joins him in an act of ratification ; she will, nevertheless, have a mortgage claim on his estate, for such portion of the proceeds as he has not accounted for. *Champagne v. Champagne's syndic*, 14 L. R. 51.

9. Where the wife claims a separation from bed and board, on the ground of repeated acts of ill treatment and cruelty by her husband, which is supported by evidence, and there is no hope of living in peace, she will be entitled to relief. *Headen v. Headen*, 15 L. R. 61.

10. The act of the wife *retracting* her renunciation of her right of mortgage on her husband's property, must be made contradictorily with the creditor in whose favor she has renounced ; so far, at least, that he should be notified of the passing of the act of *retraction*. *Landry v. Segond*, 15 L. R. 154.

11. Without notice to the creditors of the passage of the act of *retraction of the renunciation* of the wife, it will not interrupt the prescription of forty days within which it must be passed, under the act of 27th March, 1835. *Id.*

12. The paraphernal property of married women is not bound for the debts contracted by her husband while at the head of the community : neither are the fruits liable when the wife administers her own property. *Lambert v. Franchebois et al.*, 16 L. R. 1.

13. Sale by the husband to the wife when made for the replacing of her dotal and paraphernal property or effects, is *valid in law*, particularly when no fraud and collusion is alleged. *Id.*

14. So, a sale from the husband to the wife for placing her dotal and paraphernal effects, should not be attacked, unless on the ground of fraud and collusion. *Id.*

15. Property bought with the funds of the wife or acquired by her in consequence of a *dation en payement*, made to her by her tutor, and which never came under her husband's administration, is

her separate or paraphernal property. *Dominguez v. Lee et al.*, 17 L. R. 295.

16. The wife has the power to administer alone her paraphernal estate as she pleases ; and a right to alienate her separate property and to invest her paraphernal funds in whatever manner she thinks proper and most advantageous to her interest, if done with the authorization of her husband. *Id.*

17. Property purchased with the paraphernal funds of the wife is only her separate property as long as she keeps the administration of her separate estate, and when the title is taken in her own name, either as purchased with the funds she administers without the assistance of her husband, or as a *dation en payement* made to her by the debtor of a separate and paraphernal claim. *Id.*

18. Where a house and lot, the separate property of the wife, is mortgaged by husband and wife, for improvements and ameliorations put on them, these last become a part of the community of acquets and gains and are liable for the husband's debts. *Id.*

19. The husband and wife made a joint will and instituted each other sole and universal heir in case there were no children ; with a *proviso* that at the death of the survivor any property or effects remaining unsold, should go to *their heirs* as legacies in certain proportions : *held*, that the wife as the survivor became the absolute owner of all their property and could alienate it. But if any remained unsold at her death, it went to both *their heirs*. *Bernard's heirs v. Soulé*, 18 L. R. 21.

20. The rights of the heirs of either of the spouses did not vest on the death of one of them, and could not until *the decease of the survivor* ; they acquired only an eventual right or hope. *Id.*

21. The husband has the power of administering the estate of his wife, whether it be dotal or paraphernal, particularly her moveable property. *Clarke et ux. v. Firemen's Insurance Company*, 18 L. R. 431.

22. Parole evidence is admissible to prove that slaves, purchased by a married woman, were paid for out of her paraphernal funds, though not so stated in the act of sale. Such evidence is not repugnant to the deed. *Terrell v. Cutrer, syndic*, 1 R. R. 367.

23. A married woman having the right to resume, at any moment, the administration of her paraphernal property, it is unnecessary to prove that she had the actual administration at the time that she expended a part, with her husband's consent, in the purchase of other property, that act itself being one of administration. *Id.*

24. A wife's right to reinvest the proceeds of paraphernal property sold by her, is but a corollary of her right to administer, or to sell, or otherwise alienate it. Such contracts may be made by act *sous seing privé*. No law requires that they should be made by authentic act. *Id.*

25. A widow has a right to recover her paraphernal estate, in-

dependently of any settlement of the community. She cannot be charged with her share of particular debts due by the community, but only with the final balance, on a settlement of the estate, in case she has, either tacitly or expressly, accepted the community. *Jeaudron and husband v. Boudraux, tutor, &c.*, 1 R. R. 383.

26. Where the community has been dissolved by the death of the husband or wife, the survivor, with the heirs of the community, become co-proprietors of the estate; and where the surviving partner retains possession he becomes the *negotiorum gestor* of the heirs. *Griffin, tutor v. Waters*, 1 R. R. 149.

27. Where the wife retains the administration of her paraphernal estate, and the title is taken in her name, either as a purchase with funds which she administers without the assistance of her husband, or as a *dation en payement* made to her by a debtor of a separate and paraphernal claim, the property remains paraphernal, and does not fall into the community of *acquêts*. *Terrell v. Cutrer, syndic*, 1 R. R. 367.

28. Though the interest of the wife, or of her representatives, in the property of the community, attaches at the dissolution of the marriage, subject to their right of renouncing and of being exonerated from the payment of the community debts, they can claim nothing of the *acquêts* until the debts of the community are paid. *Hart and others v. Foley*, 1 R. R. 378.

29. An adjudication to the surviving partner, of the whole of the community property encumbered with his debts, is void; no such adjudication can be made before a liquidation of the community, showing the real amount of the *acquêts*, and of the property owned in common. *Id.*

30. The community is dissolved by the death of one of the spouses; and the survivor and the heirs of the deceased, are each seized of one undivided moiety of the property, subject to the payment of the debts. *Id.*

31. A creditor who wishes to hold the heirs of the wife responsible for a community debt, must join them in his suit against the husband, for the latter no longer represents the community. *Id.*

32. A notary commissioned by the judge of the Court of Probates to make the partition of community property, is the ministerial officer of the Court; and on his certificate of a refusal by the party in custody of the property to produce the same, a *distringas* may be issued to enforce a compliance. *Stewart v. Pickard and others*, 1 R. R. 415.

33. Errors or irregularities, in a partition of community property made under the authority of a Court of Probates, may be corrected by opposition to the homologation of the partition. *Id.*

34. Plaintiff having obtained a decree for separation of property from her husband, purchased a slave in her own name; five months after the decree, the slave was seized at the suit of creditors of the husband; and seven months after the seizure, she took out execu-

tion against her husband. The creditors alleged that the slave was seized in the possession of the husband, and was paid for by money furnished by him; and no evidence was offered to disprove these allegations. *Held*, that an attempt to execute the decree of separation after such a length of time, could not affect the rights of the judgment creditors; that the decree was forfeited, and the community not dissolved; that the property having been purchased in the name of the one of the spouses, belonged to the community, and was liable to seizure for the debts of the husband; and that there was no necessity for the creditors to institute a direct action against the wife, to annul the sale. *Bertie v. Walker, sheriff*, 1 R. R. 431.

35. A wife not separated in property from her husband, cannot bind herself jointly with him, either as drawer or endorser of a note, for a debt contracted on account of the community during the marriage. *Martin, executor v. Drake and husband*. 1 R. R. 218.

36. A note drawn by a wife not separated in property, to the order of her husband, and endorsed by him, is void; the latter cannot enforce its payment, nor transfer by endorsement any right to a third person to enforce it. *Id.*

37. A note drawn by a wife payable to her husband, is absolutely null and void in the hands of the latter; no law recognizes any obligation of the wife to the husband, resulting from any contract between them. But where such note has been endorsed by the latter to third person, it will bind the endorser. *Petitpain v. Palmer and husband*, 1 R. R. 220.

38. A decree for the separation of property obtained by the wife, whatever may be its terms, does not render the parties separate in property. It entitles her to a separation, but will be forfeited and without effect, if not followed by a prompt and *bonâ fide* execution of the judgment, either by the payment of the rights and claims of the wife, so far as the estate of the husband can meet them, made to appear by authentic act, or by an uninterrupted suit to obtain such payment. *Bertie v. Walker, sheriff*, 1 R. R. 431.

39. An appeal by a married woman from a judgment rendered against her, taken in her name alone and without being authorised by her husband or the Court, will be dismissed. *Gorman v. Berghans*, 1 R. R. 230.

40. The authorization required to enable a married woman to appeal from a judgment rendered against her must be proved by other evidence than the allegations of the wife or of her counsel. *Gorman v. Berghans*, 1 R. R. 468.

41. Where in an action by a married woman, defendant excepts on the ground that plaintiff was not authorised by her husband or by a Court, the only effect of the exception, if sustained, is to require the plaintiff to exhibit her authorization before proceeding farther with the case. It is immaterial at what time such authority may be obtained and produced, provided it be before the trial of

the case on its merits. C. P. 320, 321. *Bonneau v. Poydras*, 2 R. R. 1.

42. A married woman separated in bed and board, may, under the laws of the State sue without the authorization of her husband or a Court. Proof of the existence of the judgment of separation, is all that is requisite to establish her authority. C. C. 125, 2401. Act of 1st April, 1826, § 2. *Id.*

43. Under art. 2410 of the Civil Code, a wife separated in property, may dispose of her claim to a portion of the proceeds of the sale of the property of a succession, without the consent of her husband. *Id.*

44. Persons claiming a part of the state of an insolvent, as heirs of a deceased wife, on account of the community of gains, must establish their right to recover by adequate evidence. It will not be sufficient to render it probable. *Wilcox v. his creditors*, 2 R. R. 27.

45. When an action had been commenced by a married woman, without the authority of her husband or of the Court, who, two days after, obtained a judgment of separation from bed and board, on an exception to her right to sue: *held*, that the exception should be overruled, as it would have been useless to dismiss a suit which might be commenced immediately afterwards, her disability having been removed. *Baldwin v. Union Insurance Company*, 2 R. R. 133.

46. A wife can in no case sell to her husband, or contract towards him the obligations of a vendor, though the husband may, in some cases, sell to her. She cannot, consequently, be cited in warranty by the representative of her deceased husband. *Wherry v. Bell*, 2 R. R. 225.

47. The authorization required to enable a married woman to appeal from a judgment rendered against her, must be proved by other evidence than her own allegations, or those of her counsel. *Gorman v. Berghans*, 2 R. R. 282.

48. Unless specially empowered by the husband, an attorney at law cannot authorize the wife of his client to do any act for which the authorization of the husband is required. *Id.*

49. A married woman, not separated in property, cannot accept the offer of testamentary executrix, without the consent of her husband (C. C. 1657); nor can she, after acceptance, appear in Court in the execution of the trust, without the authority and assistance of the latter. The cases provided for by arts. 125 of the Civil Code, and 106 of the Code of Practice, are the only exceptions to the general rule prescribed by art. 123 of the Civil Code, that a wife cannot appear in Court without the authorization of her husband. *Dussumier v. Coiron*, 2 R. R. 368.

50. A marriage contract, executed before a notary, which attests that a sum was received by the husband from the wife, as a part of her dowry in the presence of the notary and subscribing witnes-

ses, is the best evidence of which the payment is susceptible. But it may be rebutted by evidence establishing collusion, as that the money had been obtained only for the moment and had been repaid. *Lambert v. His creditors*, 2 R. R. 474.

51. The provisions of the Civil Code which establish mortgages in favor of married women, at least so far as they are tacit and exist without being recorded, are confined to persons who marry in this State, or who, after marrying abroad, come to reside here; and in the latter case, such tacit mortgages exist only for sums received since their removal to this State. *Prats v. his creditors*, 2 R. R. 501.

52. The ratification by a husband of a contract of partnership entered into by his wife, an unemancipated minor, before marriage, will be binding on the latter, he being by law the administrator of her dower. C. C. 2327, 2329, 2330, 2334. *Jonau v. Blanchard*, 2 R. R. 513.

53. Under a judgment against a husband and wife, *in solido*, the sheriff may levy on the separate property of either. *Smallwood v. Pratt*, 3 R. R. 132.

54. The husband as the head of the community, has a right to alienate its property. When done collusively, for the purpose of injuring the wife, she has her remedy against his heirs, after his death, under art 2373 of the Civil Code, and, perhaps, after a separation from bed and board. *Id.*

55. Donations *propter nuptias* were not excepted from the provision of art. 48, tit. 2, book 3 of the Code of 1808, that no donation intervivos of moveable property or slaves, shall be valid for any other effects than those of which an estimate, signed by the donor or donee, or by those who accept for him, is annexed to the record of the donation. The omission of the estimate, in a donation of slaves, is not cured by the delivery of the slaves. *Harlin v. Léglise*, 3 R. R. 194.

56. Donations *propter nuptias* are not excepted from the general rules prescribed by the Code of 1808, in relation to other donations. *Id.*

57. A wife has a privilege on the moveables of her husband for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage, on his immoveables. C. C. 2367, 3182. *Stafford v. Dunwoodie*, 3 R. R. 276.

58. Defendant having seized under a *fi. fa.*, certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she obtained a judgment against her husband in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by defendant, to be sold, and purchased itself crediting the amount upon her judgment. On a motion to dissolve the injunction: *held*, that by his seizure defendant had acquired a privilege on the moveables seized: that the rights of the wife, being merely paraphernal, gave her no pri-

vilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Stafford v. Dunwoodie*, 3 R. R. 276.

59. Real property purchased during the existence of the community of *acquêts*, but conveyed to the wife, will be liable for debts contracted by the husband unless proved to have been paid for out the paraphernal funds of the former. *Marshall v. Mullen*, 3 R. R. 328.

60. A married woman, who is a public merchant, may bind herself for anything relative to her trade, without being empowered by her husband; and in such a case, if there be a community of *acquêts*, the husband will be also bound. C. C. 128. Otherwise, if not a public merchant. *Thorne v. Egan*, 3 R. R. 329.

61. The authorization of the husband to the commercial contracts of the wife, is presumed by law, whenever he permits her to trade in her own name. C. C. 1779. *Id.*

62. The wife cannot deprive the husband of the right to administer her dowry. He administers it for his own account, and not as her agent, and is not accountable to her for the profits or revenues derived from it. C. C. 2329, 2330. His obligations are those of an usufructuary. C. C. 2344. Debts contracted by him, during the marriage, as administrator of the dowry, are personal to him, and cannot bind the wife, if she renounce the community. C. C. 2379. *Id.*

IGNORANCE OF THE LAW.

1. Every one is bound, at his peril, to know the law applicable to his case; if he misapprehend it, he must take the consequences. he cannot make his own mistakes a ground to defeat the legal rights of others. *Oliver and others v. Stevens, sheriff and another*, 1 R. R. 86.

IMMOVEABLES.

1. The provision of art. 463 of the Civil Code, making an action for the recovery of an entire succession, an immoveable, relates only to the action given to the heir to recover an entire succession in kind, such as it existed at the time it was opened. It does not apply to an universal legatee, or legatee under an universal title, limited to claiming the moveable part of a succession, or a portion of the residue thereof, and not entitled to take possession of the estate in kind, in the condition in which it was at the opening of the succession. *Bonneau v. Poydras*, 2 R. R. 1.

2. A rail-way is not an immoveable, either by nature or destination, when the soil on which it is laid belongs to another; it is, consequently, not affected by judicial or legal mortgages, nor susceptible of being mortgaged unless authorized by a special act of the Legislature. *State v. Mexican Gulf Rail-way Company*, 3 R. R. 513.

IMPRISONMENT FOR DEBT.

1. The imprisonment of the debtor, at the instance of a creditor, on a charge of fraud, under the 10th and 11th sections of the act of March 20, 1840, abolishing imprisonment for debt, is essentially a civil suit by creditors against their debtor, to prevent the abstraction of his property, and in which an appeal lies to the Supreme Court. *State of Louisiana v. Judge of the Parish Court*, 15 L. R. 531.

2. When the law abolishing the imprisonment for debt, and with it the *capias ad satisfaciendum* was promulgated, every proceeding began, but not perfected under *these writs*, became null and void. *Cooper v. Hodge et al.*, 17 L. R. 476.

3. So, when this act took effect a *capias* in the hands of the sheriff became a nullity, and the bail was thereby instantly discharged. *Id.*

4. Writs of *Capias ad satisfaciendum* in the hands of the sheriff when the act abolishing imprisonment for debt was promulgated, became absolute nullities; an attempt to execute them would make the sheriff a trespasser, and a return of *non est inventus* would not enable the party to proceed against the bail. *Atchafalaya Bank v. Hozey, sheriff*, 17 L. R. 509.

5. The act of the 28th March, 1840, abolishing imprisonment for debt, section 5, authorizing two creditors, having two or more judgments each exceeding 300 dollars to unite in a petition requiring the common debtor, who they swear as assets, to make a surrender; also requires that both creditors shall take the oath. It is not sufficient that one of them, having two judgments alone, shall make the affidavit. *Seghers et al. v. Courcelle*, 17 L. R. 551.

6. After the promulgation of the act abolishing imprisonment for debt, no *ca. sa.* could issue; and all process against the body of the debtor being gone, *the liability of the bail ceased*; as he had no longer the power of keeping or surrendering the principal debtor. *Borgsted & Co. v. Nolan et al.*, 17 L. R. 593.

IMPROVEMENTS.

1. Workmen or others having a privilege on improvements erec-

ted on ground on which the vendor has a mortgage, cannot cause such improvements to be sold separately from the ground on which they stand ; they must be sold together, in order that highest price may be obtained, to be divided between the parties according to appraisement, the proceeds of the improvements to the parties having a privilege on them, and any surplus, with the price of the land to the vendor. *McDonough v. Le Roy*, 1 R. R. 173.

INJUNCTION.

1. An affidavit stating that all the material allegations in the petition are true to the best of the affiant's acknowledge and belief, is insufficient to support an injunction. *Catlett v. McDonald*, 13 L. R. 44.

2. To sustain an injunction, the affidavit must be such as to subject the party to the penalties of perjury, if the facts sworn to appear to be untrue. *Id.*

3. When the affidavit is insufficient, the injunction must be dissolved, even if it appears from the evidence that the party would be instantly entitled to a new one. *Id.*

4. In dissolving an injunction, not more than twenty per cent damages can be allowed, unless damages to a greater amount *be proved*. It is not sufficient to add fifty dollars to the damages for counsel fees, which the party will have to pay. *Wilcox v. Bundy*, 13 L. R. 380.

5. In dissolving injunctions, interest can only be allowed on the amount of the judgment actually due. *Cannon v. Labarre*, 13 L. R. 399.

6. An affidavit which declares that all the material facts in the forgoing petition set forth, are true, is too indefinite and uncertain to sustain an injunction. *Sauvinet v. Poupono f. m. c.* 14 L. R. 87.

7. An affidavit for an injunction, must be direct, positive and unconditional ; and where it only attests the truth and correctness of the facts and allegations in the petition, which renders the injunction necessary, it is *insufficient*. *Id.*

8. On the dissolution of an injunction, the fee of the defendant's attorney may be assessed as special damages. *Id.*

9. The plaintiffs obtained an injunction restraining the defendant from carrying on a bakery in wooden buildings adjacent to theirs, and in the midst of the town of Alexandria, on the ground of imminent danger to their property and a nuisance. The jury found twelve hundred dollars in damages for the defendant on his plea in reconvention, for injury and loss sustained by the injunction, which the Court refused to disturb. *Martin et al v. Nally*, 14 L. R. 205.

10. It is not enough to obtain an injunction staying executory proceedings to show an abstract irregularity. Injury to the applicant, or some apprehension of it, can alone justify a resort to this remedy. *Morgan v. Whiteside's curator*, 14 L. R. 277.

11. So an injunction should not be granted to stay an order of seizure and sale, when it is clear the party has a right to make another seizure by taking out an alias order. *Id.*

12. The law not only requires a statement of the facts showing an injunction to be necessary, before it is granted, but they must be positively sworn to, so as to subject the parties to the penalties of perjury, if not true. *LeBlanc v. Dasheill*, 14 L. R. 274.

13. The act of 1831, section 3, allowing interest and damages on the dissolution of an injunction, does not apply to an opposition and injunction to stay on order of seizure and sale. *Dashiell v. Lessas-sier*, 15 L. R. 101.

14. The plaintiff in an opposition and injunction against an order of seizure and sale, may *discontinue* his suit without being required to pay either special or other damages, as it is only incidental to the hypothecary action, and he gives no security bond. *Id.*

15. An injunction will not be dissolved, when the party is immediately entitled to a new one. *Woodward v. Dashiell*, 15 L. R. 184.

16. So where an injunction was properly obtained, but it became necessary that it should be dissolved, no damages should be allowed. *Id.*

17. A judgment by default cannot be taken by the plaintiff, in an opposition and injunction to an order of seizure and sale. No answer is required: a rule taken by the adverse party to dissolve the injunction, is equivalent to an answer, and the injunction may be tried summarily. *Dawson v. Duplantier*, 15 L. R. 289.

18. The trial of a rule taken to set aside and dissolve an opposition and injunction staying executory proceedings, is a trial on the merits, in which the plaintiff therein is called on to support the grounds of his opposition by evidence. *Id.*

19. Want of amicable demand, does not authorize an injunction to prevent or delay the payment of a debt. *Exchange and Banking Co. v. Walden*, 15 L. R. 431.

20. When an injunction is perpetuated for a part of the sum enjoined, the party obtaining it will not be liable to damages and costs on its dissolution for the remainder. *Wells v. Gordon*, 16 L. R. 219.

21. Where a party is condemned as surety on a bail bond *without notice* of judgment *ni si*, or a copy served on him, his remedy is by appeal and not injunction. *Cook v. State of Louisiana*, 16 L. R. 288.

22. If a judgment is so illegal as to be a nullity, an action of nullity and not an injunction should be resorted to. *Id.*

23. An injunction to stay an order of seizure and sale of a tract

of land, on the ground that there is a deficiency in the quantity sold, when it is a sale *per aversionem*, will be dissolved with damages, as having wrongfully issued. *Brazeale & Swell v. Bordelon administrator et al.*, 16 L. R. 333.

24. Attorney's fees are sometimes allowed as special damages on the dissolution of an injunction wrongfully sued out, as a punishment for the unjustifiable resort to this as a means of delay to defeat the ends of justice. *Smith v. Bradford*, 17 L. R. 263.

25. But where an injunction is maintained against hypothecary or executory proceedings on account of any defect in the affidavit and other of the proceedings, special damages or lawyer's fees will not be allowed. *Id.*

26. Damages for the wrongful suing out of an injunction may be claimed in the same suit under the provisions of the act of 1831, in cases embraced by it; but from its wording it seems to apply particularly where *judgments are enjoined*. *Morgan v. Driggs et al.*, 17 L. R. 176.

27. Where there are irregularities in the proceedings of plaintiff in issuing a *pluries* writ of seizure; and also in the defendant's enjoining it for the whole, when it was admitted part of the sum claimed was due, the injunction will be dissolved at defendant's costs. *Salter v. McHenry et al.*, 17 L. R. 507.

28. An affidavit stating all the material allegations in the forgoing petition *are just and true* and are such in the opinion of the affiant, to authorize the issuing of an injunction, is insufficient to support the injunction. *Boatner v. Walker et al.*, 17 L. R. 461.

29. The materiality of facts and their sufficiency to sustain an injunction are matters of law, which must be decided by the Court. *Id.*

30. The appellant from a judgment dissolving an injunction, obtained against an order of seizure and sale, cannot take a suspensive appeal without giving security as in other cases of such appeals. Security for costs is not sufficient. *State v. Judge of Third District*, 18 L. R. 444.

31. The article 740 of the Code of Practice is an exception to the rule requiring security in obtaining an injunction to stay an order of seizure and sale, but only applies to that class of cases. *Id.*

32. An injunction should not be granted to suspend an execution, on the ground that the petition for a suspensive appeal and appeal bond, were lost before the appeal was granted. *State v. Judge of the 1st District Court*, 18 L. R. 542.

33. The debtor alone has a right of enjoining proceedings under executory process without giving security. His vendee or the third possessor of the mortgaged property cannot. *Pepper et al. v. Dunlap*, 19 L. R. 491.

34. On the dissolution of injunctions the damages should only be estimated on the amount actually due at the time of granting the injunction, or the sum *actually enjoined*, and not on notes or instal-

ments of the same debt becoming due during the pendency of the injunction. *Pepper et al. v. Dunlap*, 19 L. R. 491.

35. The plaintiff in injunction, who is non-suited, is entitled to a suspensive appeal on giving his bond for the amount of the costs and one half over. *State of Louisiana v. Judge of the 1st District*, 19 L. R. 167.

36. In an injunction case to restrain the adverse party from taking out an order of seizure and sale, when the plaintiff is non-suited, a writ of prohibition will be granted to the judge *a quo*, prohibiting him from proceeding to allow the order of seizure, until the party is heard on his appeal. *Id.*

37. Such as the injunction originally was before the judgment of non-suit, so it remains until the appeal is tried; and no proceedings can be had until it is finally decided in the Supreme Court. *Id.*

38. Interest on the dissolution of injunctions cannot exceed ten per cent; if the judgment enjoined bears ten per cent interest; all above that sum which is allowed must be in the way of damages if the injunction is dissolved. *R. McCarty v. J. P. McCarty*, 19 L. R. 300.

39. Where a judgment, which is enjoined already, bears interest at ten per cent per annum, no further interest can be allowed on a dissolution of the injunction. *Smith v. Brawnson*, 19 L. R. 313.

40. Interest on the dissolution of the injunction may be increased to ten per cent; but whatever else, that may be allowed against the plaintiff and his surety in injunction, should be given as damages. *Id.*

41. On the dissolution of injunctions under the statute of 1831, this Court has sometimes allowed as damages, the expenses for professional services, which the creditor enjoined has incurred in setting the injunction aside, when improperly obtained. *Melançon's heirs v. Robichaud's heirs*, 19 L. R. 357.

42. The defendant in injunction enjoining his order of seizure and sale, changes the proceedings from the *via executiva* to the *via ordinaria*, when he prays for judgment against the debtor. In cases of this kind no damages should be allowed and judgment must be given as in an ordinary suit. *McMillen v. McKerroll et al.*, 19 L. R. 372.

43. The Courts will not assess damages on a plea in reconvention, in a suit by injunction or sequestration; the party must take his remedy on the bonds given by the plaintiff in injunction. *Patin v. Blaise jr.*, 19 L. R. 396.

44. Damages for the wrongful suing out an injunction may be claimed in the same suit under the provisions of the act of 1831, in cases embraced by this act; but from its wording it seems to apply particularly, where judgments are enjoined. *Id.*

45. When it appears in the progress of a trial, that a payment is made of part of the debt; although the injunction may have to be dissolved for want of an allegation of payment, yet a new one for

the amount should be granted and perpetuated. *Woodburn v. Friend et al.*, 19 L. R. 496.

46. Where the party is entitled to a new injunction *instanter* for a part of the debt, on the dissolution of the first, he will not be mulct in damages. *Id.*

47. On an application for an injunction to the District Court, in the absence of the judge, the petition must be addressed to the judge of that Court, and not to the parish judge, though the latter be applied to, under the act of 1835, to grant it. *Stanbrough v. Scott, sheriff and another*, 1 R. R. 43. *Wadsworth v. Harris and another*, 1 R. R. 96.

48. It is not necessary in granting an injunction that the judge should state in his order into what Court it is to be made returnable. It is the duty of the clerk, to issue the writ according to law. *Stanbrough v. Scott, sheriff and another*, 1 R. R. 43.

49. It will be no objection to an injunction bond, that it was dated before the petition for the injunction was filed. It is enough that it be of sufficient amount, with solvent surities, and such that the party, in whose favor it is given may maintain an action upon it. *Id.*

50. Where an order by the parish judge, granting an injunction from the District Court, recites that it was made in the absence of the district judge, such absence will be presumed. *Id.*

51. The act of 25th March, 1831, relative to injunctions, is one of great severity, and must be rigorously construed. It applies only where judgments have been enjoined; in all other cases, the parties must be left to their action on the bond. *Griffin v. Cotten*, 1 R. R. 142.

52. Mere irregularity, is not enough to obtain an injunction; injury to the applicant, or apprehension of injury, must be shown. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

53. An injunction and not a rule to show cause, is the proper proceeding to arrest an order of seizure and sale. C. P. 738. *Clement v. Oakey*, 2 R. R. 90.

54. On a motion to dissolve an injunction, on the ground of illegality apparent, on the face of the petition, no evidence can be introduced, except as to the question of damages. *Hobson v. Bein*, 2 R. R. 109.

55. Section 3 of the act of 25th March, 1831, authorising the Court, in case of the dissolution of an injunction, to condemn, in the same judgment, the plaintiff and his surety, jointly and severally, to pay to the defendant interest on the amount of the judgment and damages, applies only where judgments have been enjoined. In other cases, the defendant must be left to his remedy on the bond. *Walden v. City Bank of New-Orleans*, 2 R. R. 165. *First Municipality of New-Orleans v. Orleans Theatre Company*, 2 R. R. 209.

56. Defendant commenced an action to rescind a contract of

loan of \$200,000, the amount of which was secured by mortgage, and obtained an injunction to restrain the plaintiffs from summary proceedings under the mortgage until the further order of Court. The injunction having been dissolved, he and his sureties in the injunction bond took a suspensive appeal, giving security in the sum of \$6000. Plaintiffs thereupon applied for an order of seizure and sale, which was refused, on the ground of the pendency of the appeal from the order dissolving the injunction. On appeal by the plaintiffs from this judgment: *held*, that a suspensive appeal having been taken from the judgment of dissolution, the injunction was thereby maintained until the final decision of the appellate Court. *City Bank of New-Orleans v. Walden*, 2 R. R. 181.

57. The surety in an injunction bond may be surety for his principal, on an appeal by the latter from a judgment dissolving the injunction, and condemning principal and surety, *in solido*, to the payment of damages and costs. *Greiner v. Prendergast* 2 R. R. 235.

58. The discovery since the final decision of the Appellate Court, of new evidence tending to establish allegations in the original petition, is no ground for enjoining the execution of the judgment. The matter is *res judicata*. *Campbell v. Briggs*, 3 R. R. 110.

59. The trial of an injunction is a summary proceeding, in which neither party is entitled to a jury. *Dabbs v. Hemken* 3 R. R. 123.

60. Where sufficient property could not be found, or has not been seized to satisfy an execution, a further seizure may be made when the deficiency is discovered, or other property found. Where more property has been seized than sufficient, the remedy is pointed out by arts. 652 and 653 of the Code of Practice. Such an over seizure will not authorize an injunction. *Id.*

61. A proper construction of the third section of the act of the 25th March, 1831, will not authorize the Court, on dissolving an injunction, to increase the interest, where the original judgment bears interest at ten per cent a year. Whatever also it may be proper to allow, must be in the form of damages. *Id.*

62. An execution cannot be enjoined, on grounds which might have been pleaded in defence before judgment. *Benton v. Roberts*, 3 R. R. 224.

63. An injunction will not lie to stay the execution of a judgment for the amount of a note given for the price of a tract of land, on the allegation, that since the rendering of the judgment, plaintiff has discovered that the defendant, his vendor, had no title to the land. The execution can only be resisted by appeal, or action of nullity, or on an allegation of extinguishment by payment, release, confusion, novation or other legal mode. *Morrison v. Crooks*, 3 R. R. 273.

64. A party against whom an order of seizure and sale had been issued, presented a petition alleging that the mortgage and notes were obtained by fraud, and that the mortgage was illegally exe-

cuted, and praying for an injunction, for a judgment rescinding the act, for damages against the mortgagee and a third person alleged to have been concerned in the fraud, and for a trial by jury. The mortgagee answered, praying that the injunction, might be dissolved, the demand rejected, and for a judgment in his favor for the amount of his debt. *Held*, that the causes of opposition not being confined to those enumerated in art. 739 of the Code of Practice, and the proceedings having been changed from the *via executiva* to the *via ordinaria*, the mortgagee must be considered as a defendant in the proceedings to obtain the injunction; and that the other party, like other plaintiffs, was entitled to open and close the argument. *Beaulieu v. Furst*, 3 R. R. 345.

INSOLVENCY.

1. An insolvent succession, the administration of which is refused or will not be accepted by the beneficiary heirs their agent, tutor or curator, may be surrendered to the creditors, who are authorised to appoint syndics to administer thereon. *Baron's widow and heirs v. Hodge*, 13 L. R. 58.

2. So, where the widow and tutrix of the minor children provoked the meeting of creditors of the insolvent estate of her deceased husband, abandoned the administration and appeared in the *concurso* and voted for syndics: *held*, that she was thereby precluded from making any opposition to the proceedings previously had in the case. *Id.*

3. The act for the relief of insolvent debtors in actual custody, requires as a pre-requisite to obtain the relief it affords, if the applicant is a merchant or trader, that he deposit in Court his books and accounts, along with his schedule. *Bell v. his creditors*, 13 L. R. 199.

4. Although the law does not require and cannot oblige a merchant or trader to keep books, yet to be entitled to the benefit of its provisions relating to insolvent debtors, *he must have and deposit* them in Court for the inspection of his creditors. *Id.*

5. An opposition to the provisional tableau filed by a syndic, comes too late when ten days have expired after the order of publication, and when judgment of homologation has been *pronounced*; although it be *not signed*. *Lang et al. v. their creditors*, 14 L. R. 237.

6. A new trial will not be granted when a party has neglected to file his opposition to a tableau until judgment of homologation has been pronounced, even if he presents himself and moves for it before judgment is signed. *Id.*

7. The judgment of homologation of a tableau of distribution, so far as it settles the rank of creditors is final, and *res judicata* as

to a subsequent tableau in the same case. *Lang et al. v. their creditors*, 14 L. R. 241.

8. So, a creditor placed on the first tableau without *a privilege*, cannot on the filing of a second or definite tableau claim a *privilege*, because the funds on which he seeks to enforce it, have not been distributed, but carried to the mass of the ordinary creditors at the head of the second tableau. *Id.*

9. Creditors having claims against property, surrendered by the insolvents, will not be permitted to litigate their demands separately against the syndics, but will be required to cumulate them with the insolvent proceedings. *Blois, tutor &c, v. Yard & Blois's syndics*, 14 L. R. 250.

10. In a *concurso*, where all the parties are plaintiffs and defendants, any averment made by a creditor in relation to a particular claim, charging fraud and collusion, must *avail all the other* opposing creditors interested in defeating it; because a claim cannot be rejected as to some creditors, and upheld as to others. *Adams v. his creditors*, 14 L. R. 454.

11. Where attacking creditors commence their revocatory actions about the same time, and use proper diligence, one shall not have exclusive privilege on the property fraudulently conveyed and recovered, simply because his suit was first commenced. The property must be divided, *pro rata* among them. *Walton & Son v. Bemiss et al.*, 16 L. R. 140.

12. Persons who are not creditors of an insolvent debtor, may purchase and receive transfers of his property, after he is in insolvent circumstances, and it cannot be complained of by his creditors, when they appear to be purchasers for a valuable consideration and in good faith. *Dwight & Hartman v. Bemiss et al.*, 16 L. R. 145.

13. But if an insolvent debtor use the proceeds of sales of his property in such a manner as to give a preference to one creditor over another, the law will interfere and correct it. *Id.*

14. The act of 1817, relative to voluntary surrenders, is highly penal, and must be strictly construed as regards debtors charged with fraud. *Campbell v. his creditors*, 16 L. R. 348.

15. So, where the verdict of the jury in a case of fraud, finds the facts charged as fraudulent, *to be true*, but negatives any fraudulent intent on the part of the ceding debtor, it is substantially a verdict of acquittal, and judgment must be so pronounced. *Id.*

16. Every act done by a debtor, with the intent of depriving his creditor of the eventual right he has on the property of the former, is illegal, and as respects such creditors, ought to be avoided. *Hempkin v. Bowmar et al.*, 16 L. R. 363.

17. In a revocatory action to set aside a mortgage made in fraud of creditors, it is not necessary to prove that the mortgagee was aware of the debtor's insolvency; proof of fraud against the

mortgagee, as giving a preference, and the injury resulting to other creditors, is sufficient. *Hewpkin v. Bowmar et al.*, 16 L. R. 363.

18. Where a debtor is perhaps in insolvent circumstances, but when there is no proof that the creditor had any knowledge of it, he may give a valid mortgage in favor of such creditor. *Brander et al. v. Bowmar & Abercrombie*, 16 L. R. 370.

19. So, a prior mortgage to secure endorsements not paid, will have a preference over a judgment creditor, whose judgment is not recorded, when there is no proof of knowledge of the insolvency of the debtor, at the time, by the mortgagee. *Id.*

20. The peremptory exception given by the 1988th article of the Code which says, no creditor can sue individually to annul contracts, made *before his debt accrued*, will apply to all contracts made *in fraud of creditors*, when it appears the debtor never ceased to have possession of the objects apparently sold by him. *Thibodeaux v. Thomasson et al.*, 17 L. R. 353.

21. The creditor who has contracted under the faith of his debtor's being the owner of property which he is in possession of, at the time of the contract, ought to be allowed to seek his remedy without regard to the date of the pretended sale or contract. *Id.*

22. A mortgagee claiming to have a mortgage on some of the property surrendered, given *by the wife of the insolvent*, cannot be admitted to a meeting of *his creditors* and vote for a sale of the property for cash. *Bostwick v. his creditors*, 17 L. R. 505.

23. None but a creditor of the *insolvent* can be present at the meeting of his creditors. A mortgagee of some of the property surrendered, who is not a creditor, can exercise his hypothecary action against it, or its proceeds in the hands of the syndic. *Id.*

24. The syndic is *without authority* to raise mortgages existing on property surrendered, in favor of persons, before it passed into the hands of the *insolvent* and who are not his creditors. *Foley v. dufour et al.*, 17 L. R. 521.

25. A purchasing creditor retaining the price, is bound to refund and pay over his share of the law charges of an insolvent estate. *Monbouchet's curator v. Ferraud fils*, 18 L. R. 372.

26. In order to constitute a fraud, two conditions are necessary; there must be the *intention* of defrauding, and the event or actual loss sustained by the creditors to deprive the debtor of the benefit of the insolvent laws. *Montilly v. his creditors*, 18 L. R. 383.

27. Where the charge of fraud is made against a ceding debtor, in order that the Court may judge of the nature and *extent* of the fraud, and to determine whether the acts complained of come within the purview of the law; they should be clearly and distinctly specified in the written opposition; general allegations are not sufficient. *Id.*

28. So, where the allegations are mere matters of legal right, subject to be disputed and controverted in the *concurso*, they do not amount to a *fraud* against creditors within the meaning of the

22d, 23d and 24th sections of the act of 1817, and 10th sect. of the act of 1840, relating to insolvent debtors. *Montilly v. his creditors*, 18 L. R. 383.

29. The word *deposition* in the 18th section of the act of 1817, relating to voluntary surrenders of property, is a mistranslation or misprint from the french text, and it evidently means *opposition*. *Cassidy v. his creditors*, 18 L. R. 402.

30. An attorney may represent his constituent at a meeting of creditors, even where the latter is present in the city, where the meeting is held. *Id.*

31. The holder and endorsee of a note not yet due, should be placed on the Bilan of the insolvent debtor, as a contingent and conditional creditor, and made a party to the *concurso*. *Deslix v. Schmidt*, 18 L. R. 464.

32. A creditor cannot be made a party to the insolvency of his debtor, if he is omitted to be placed on the tableau by a supplemental petition, filed after the insolvent proceedings are closed and homologated. *Id.*

33. So, a creditor who is not put on the Bilan and cited, is not bound by the insolvent proceedings, even if he be placed on the tableau of distribution, but declines receiving his dividend. *Id.*

34. Under the act of 25th March, 1808, for the benefit of insolvent debtors, in actual custody, any creditor, at any stage of the proceedings, may make charge and suggest fraud, to which the debtor must plead, and the issue is to be tried by a jury. *Parlange v. his creditors*, 18 L. R. 475.

35. The debtor cannot avoid this issue by denying the creditor's right to vote for or against his discharge, because his claim is not proven by a notarial act &c., there is nothing in the law requiring the creditor to give his vote before filing the suggestion of fraud therein alluded to. *Id.*

36. Under the act of 1808, although the insolvent failed to deposit his books in the clerk's office at the time of his application, yet he may be permitted to do so as soon thereof as they were *called for*; even after opposition filed. *Porter v. his creditors*, 18 L. R. 495.

37. Where the opponent alleges, *he beleives* the insolvent has omitted to put all his property in his schedule, it will not be considered a charge of fraud. *Id.*

38. The loss of a part of insolvent's books, shown by his own affidavit, and that of another person taken *ex parte*, and letters and hearsay evidence, if received without objection, will be deemed sufficient. *Id.*

39. When there were no creditors in court opposing the discharge, there is no obstacle to his liberation under the act of 1808. *Id.*

40. When the opposition does not contain an actual charge of fraud, a jury need not be empannelled to try it. *Id.*

41. An insolvent debtor may make valid sales of his property at any

time before actual insolvency, when no preference is given to any creditor over others. *Crocker, Syndic, &c. v. Champlin*, 19 L. R. 12.

42. The oath of an opposing creditor is not necessary to his opposition made to the appointment of a syndic. *Girard et al. v. their creditors*, 19 L. R. 246.

43. The syndic cannot claim the reversal of a judgment, which reduces his claims on his tableau, and when he and none of the creditors, whom he represents, are aggrieved. *Fergusson & Hall et al. v. their creditors*, 19 L. R. 278.

44. So, where a creditor's claim is reduced from a privileged to an ordinary one, and he does not appeal, the syndic representing the mass of creditors who are benefited, cannot appeal or have the judgment altered. *Id.*

45. A privilege claim of the vendor will not be allowed on the goods of the insolvent, mingled with an old stock, and when they are not identified. *Id.*

46. Where it is not shown or does not appear, that the insolvent was a merchant or trader, or even kept any books, he will not be denied the benefit of the insolvent laws, for not depositing any books in court. *Wilson v. his creditors*, 19 L. R. 33.

47. When the evidence of the debt and writ of arrest are produced, it is sufficient to show, the debtor is in actual custody, to entitle him to the benefit of the law for the relief of debtors in actual custody. *Id.*

48. Where the debtor makes a cession of his property which has been sequestered, it should be delivered up to the syndic to be sold; the privilege or claim of the suing creditor being preserved on the proceeds; and the sequestration is consequently cancelled. *Duclerc v. Crebassol et al.*, 19 L. R. 91.

49. It is necessary to allege and show, that an absconding insolvent debtor was a merchant or trader under the act of 1826, to sustain an action for a forced surrender. The allegation must be made in the pleadings, in order to let in evidence in proof of it. *Shakespear et al. v. Saunders*, 19 L. R. 97.

50. A sale by the father to his son not a creditor, of his estate for a sound price, where there is no privity between the latter and the creditors of his father, and none between the father and the creditors, is valid, although the father was insolvent at the time, and the son agreed and did apply the price to the payment of a portion of the creditors. Nor is the mere relationship of the father and son evidence of the fraud. *Maurin & Co. v. Rouquer et al.*, 19 L. R. 594.

51. The return of a summons to attend a meeting of the creditors of an insolvent who has surrendered his property, should be made by the sheriff as in the case of an ordinary citation; but where, by the neglect of the latter, no return has been made, third

persons will not be allowed to suffer, but a return will be ordered to be made *nunc pro tunc*. *McCormick v. Broadwell*, 1 R. R. 165.

52. After a stay of proceedings no judicial process can be issued at the suit of any creditor placed on the schedule of the insolvent and notified of the failure, either against such insolvent, or his bail. *Id.*

53. The syndic of the creditors of an insolvent cannot appeal from a judgment, establishing the privileges of the creditors with regard to each other. The estate is not aggrieved by such a judgment; it affects only the individual rights of the creditors. *Kohn, syndic and others v. Wagner and another*, 1 R. R. 275.

54. Where the creditors of an insolvent, having voted for two persons as joint syndics, remain silent while one of the two procures himself to be recognized by the Court as sole syndic, sells the property of the estate, completes his administration, and files his accounts, and a final tableau of distribution, which is homologated without opposition, they will be considered as having ratified his acts, and will be bound by their silence. *Smith and another v. Delalande and another*, 1 R. R. 384.

55. A contract made by the syndic of the creditors of an insolvent with counsel, to pay a certain sum for *professional* services for the benefit of the estate, is not conclusive upon the creditors, who may oppose the allowance, and reduce the amount, if exorbitant. Such allowance should be in proportion to the number and importance of the suits prosecuted or defended, and to the other professional services rendered; and will form a charge upon the creditors. *Girard and another v. their creditors*, 1 R. R. 455.

56. Wherever his domicil may be, a syndic of the creditors of an insolvent is always amenable to the Court under whose authority he was appointed, and to whom he is accountable for his administration. By accepting the appointment, he waves any right to except to the jurisdiction on the score of domicil. So, where a syndic has been removed, an action against him for a balance due to the creditors, is properly brought before the Court seized of the *concurso*. *Rodriguez, syndic v. Dubertrand and another*, 1 R. R. 535.

57. In an action by the syndic of the creditors of an insolvent, against a former syndic, to recover a balance due to the estate, evidence is inadmissible to prove payments to the creditors not sanctioned by an order of Court. Such evidence if admitted, would not be conclusive against the creditors, contradictorily with whom the claims, alleged to have been paid, must be proved, as well as their rank and privilege. *Id.*

58. In an action by the syndics of the creditors of an insolvent, against a former syndic, by whom payments had been made, before the act of the 13th of March, 1837, to the creditors of the estate without an order of the Court, but without fraud; *held*, that the defendant should be allowed an opportunity to prove, contradicto-

rily with the creditors that he had discharged debts due by the insolvent, and that in so doing he did no injury to the creditors still unpaid, which can only be done on the filing of a tableau of distribution by the new syndic; and judgment against the latter for the whole amount received as syndic, with a stay of execution on giving security for the payment of any balance which it may appear on the filing of the final tableau of distribution by the new syndic, that he has no right to retain. *Rodriguez, syndic v. Dubertrand and another*, 1 R. R. 535.

59. The penalties imposed by the act of 13th March, 1837, amending the act relative to the voluntary surrender of property, are only applicable to cases arising subsequent to its promulgation. *Id.*

60. The syndic of the creditors of an insolvent is entitled to a commission on the proceeds of the sale of the mortgaged property, though purchased by the mortgagee, who retains the price in discharge of the mortgage claim. *Maxan v. his creditors*, 1 R. R. 560.

61. The compensation allowed to counsel appointed to represent the absent creditors in cases of insolvency, is in no case to be paid by the mass of creditors. The act of 1817, which provides that such compensation shall be at the rate of five per cent on the amount recovered by the absent creditors, to be deducted from such amount, and that it shall not exceed the sum of two hundred and fifty dollars, is not repealed by the 3164th article of the Civil Code. *Bijotat v. his creditors*, 1 R. R. 272.

62. In all cases where compensation is to be computed by a *per centage* and no sum is realized by which it is to be borne, the compensation fails. *Id.*

63. Where on an application by an insolvent for a discharge from custody under the act of 25th March, 1808, the circumstances of the case induce the belief that the applicant, who was a merchant, had kept books or accounts which he has not surrendered, and no good reason is shown for not producing them, his petition will be rejected. *Salzman v. his creditors*, 1 R. R. 169.

64. Where one of the creditors of an insolvent, has within the ten days following the appointment of the syndic, opposed his application for the benefit of the laws relative to the voluntary surrender of property, on a charge of fraud, and the debtor, by failing to answer the interrogatories propounded to him, by the opponent, has established the charge, the latter will not be allowed to discontinue his opposition, which may be prosecuted by any creditor, though he may not have opposed the surrender within the ten days. *Robinson v. his creditors*, 1 R. R. 452.

65. Where an insolvent debtor, who has applied for the benefit of the laws relative to the voluntary surrender of property, has, subsequently to his application, done any act which amounts to a fraud upon his creditors, and which could not, from the time when it was done, have been presented in an opposition filed within the

ten days following the appointment of the syndic, he may be opposed after the expiration of the ten days. *Robinson v. his creditors*, 1 R. R. 452.

66. An insolvent, who has surrendered his property to his creditors, is interested that the estate should be legally disposed of, in order, to diminish as much as possible the balance that may remain due, in case of its insufficiency to pay his debts in full, or in case of its sufficiency, to preserve for himself whatever may be left after the creditors have been satisfied; but this interest is not a real one, in any part of the property ceded. *Smith and another v. Delalande and another*, 1 R. R. 384.

67. A debtor who has surrendered his property to his creditors, cannot, after the proceedings in insolvency have been closed, interfere and set aside a sale, by the syndic, of property in the hands of an innocent purchaser. *Id.*

68. Where the amount applicable to the payment of the law charges privileged against the estate of an insolvent, is insufficient to pay the whole, they must be paid *pro rata*. *Garretson v. his creditors*, 1 R. R. 445.

69. an action for the recovery of goods claimed by plaintiff as his property, which had been surrendered by an insolvent, against one who holds them as the syndic of the creditors of the insolvent, must be brought before the Court in which the proceedings in insolvency are pending, and must be tried contradictorily with the creditors. Otherwise, were defendant sued in his private capacity, for damages for unlawfully taken possession of the property of the plaintiff, such an action may be brought before any Court of competent jurisdiction. *Clossman v. Barbancey*, 2 R. R. 346.

70. Bail may arrest the principal out of the State in which the bail bond was given, and even after the latter has obtained a stay of proceedings. *Ex parte Lafonta*, 2 R. R. 495.

71. All the rights and property of the insolvent pass to his creditors by the surrender, whether included in his schedule or not. *Baldwin v. Union Insurance Co.*, 2 R. R. 133.

72. The creditors of an insolvent who has made a surrender, are not the owners of the property surrendered for their benefit. Their interest is the same as that of a plaintiff in property seized under a *fi. fa.* They cannot sell it without an order of the Court before which the proceedings are pending; and the sale must be made like that of property seized under execution. *Rivas v. Hunstock*, 2 R. R. 187.

73. By the acceptance of the *cessio bonorum* by the judge for the benefit of the creditors, the property surrendered is vested in the latter so as to be no longer liable to seizure, attachment or execution; but they acquire no real ownership in it. It is vested in them only to a certain extent, and for certain purposes. They cannot hold it in common, nor partition it in kind. It is in their hands

only as a pledge, which they are bound to have sold in the manner pointed out by law, in order to divide the proceeds among themselves. The real ownership remains in the debtor, who may take it back on depositing in Court a sum sufficient to pay his debts; and who, in case of sale, is entitled to any balance in the hands of the syndic after the payment of his debts, as an ordinary debtor to any surplus in the hands of the sheriff after the satisfaction of the judgment, under which his property has been sold. *Rivas v. Hunstock*, 3 R. R. 187.

74. A contract will be deemed to have been made in fraud of creditors, where the obligee knew that the obligor was in insolvent circumstances, and the contract gives to the obligee, if a creditor, any advantage over the other creditors of the obligor. It will not be necessary to establish positive knowledge in the obligee of such insolvency; proof of circumstances tending to produce a strong impression that he was aware of it, will suffice. *De Blanc v. Martin*, 2 R. R. 38.

75. A contract made in good faith cannot be annulled, though it prove injurious to creditors: nor can a contract, though made in bad faith, be rescinded, unless it operate to their injury. C. C. 1973. *Taylor v. Whittemore*, 2 R. R. 99.

76. A Third person, not a creditor, having advanced money to defendants, at an usurious interest, on certain articles held as security for its re-payment, which advances were applied to the benefit of the creditors of the latter, on a seizure by plaintiffs under an execution against defendants: *held*, that such third person ought to lose the usurious interest exacted by him; and that the difference between the sum advanced and the real value of the articles is all that was liable to seizure. *Id.*

77. Where notes given for the price of property, sold by one in insolvent circumstances for the purpose of giving an undue preference to certain creditors, have, in the ordinary course of trade, come into the possession of third parties, without notice of the nullity of the sale, the latter will be protected. *Robinson v. Shelton*, 2 R. R. 277.

78. An action to rescind a contract of sale or pledge made by an insolvent, on the ground of its having been executed with intent to give a preference to certain creditors, is prescribed by one year. C. C. 1982. *Id.*

79. By art. 2602 of the Civil Code, all the warranties to which private sales are subject, exist against the heirs in judicial sales of the property of succession. *Aliter*, as to the creditors, on the sale of the property surrendered by an insolvent. The heirs are warrantors to the fullest extent, being owners and vendors, while the creditors are neither. The latter are only responsible, severally, for the restitution of the proceeds of the sale of the property received by them. *Rivas v. Hunstock*, 2 R. R. 187.

80. Where the creditors of an insolvent do not avail themselves

of the privilege allowed them by the act of 29th March, 1826, to fix the terms on which the property surrendered shall be sold, the sale must be made on the terms and with the formalities prescribed for the sale of property seized in execution, Civil Code, art. 2180. It must be appraised, and first offered for sale for cash, when, if it cannot be sold for two-thirds of its appraised value it must be offered fifteen days after, if immoveable property, on a credit of twelve months. Code of Practice, arts. 695, 680, 681. *Aliter*, where the creditors have, under the act of 1826, fixed the terms of sale. *Egerton &c. v. their creditors*, 2 R. R. 201.

81. The provision requiring that, in forced sales for cash, the property shall bring two-thirds of its appraised value, was intended for the protection of the debtor, whose property might otherwise be sacrificed. But this danger does not exist, where the creditors of an insolvent, who are interested that the property shall sell for as much as possible, have themselves fixed the terms which they consider the most favorable; in such a case, the syndic is not bound to act with the same strictness as a sheriff acting under *fi. fa.* He may, like other agents, exercise his discretion, and under proper circumstances, may suspend the sale, if the property is likely to be sacrificed. Act 20th Feb. 1817. *Id.*

82. The sale of an immoveable by the syndic of the creditors of an insolvent, cannot affect the rights of a creditor who never made himself a party to the insolvent proceedings, having a mortgage with a pact *de non alienando*. He may seize and sell the property into whosoever hands it may have passed. But where, by appearing at the meeting of creditors, and fixing the terms, of sale of the mortgaged property, he has made himself a party to the *concurso*, he will be considered as having waived this right, and must look to the proceeds in the hands of the syndic, whom he has made his agent. *Id.*

83. The application, required by sect. 30 of the act of 20th February, 1817, to be made to the Court by the syndic, for authority to sell the property of an insolvent, may be by motion, which is but an oral petition. The object of the law is answered, when the syndic is authorised by the Court. *Lange v. his creditors*, 2 R. R. 539.

84. The appraisers of property surrendered by an insolvent, and ordered to be sold, are not required to be appointed and sworn by the Court, before which the *concurso* is pending. It will be a sufficient compliance with art. 2180 of the Civil Code, which requires the sales of property ceded to creditors to be made on the same terms and under the same formalities as property seized on execution, if the formalities be substantially fulfilled. *Id.*

85. Where money belonging to the estate of an insolvent, has been withdrawn from bank on the joint checks of the two syndics, and there is no proof of the amounts which they respectively recei-

ved or retained, each will be presumed to have received one half. *Yard, &c. v. their creditors*, 2 R. R. 400.

86. The responsibility of the syndics of the creditors of an insolvent is joint, not joint and several. C. C. 2983. *Id.*

87. The penalty imposed by the act of 13th March, 1837, sec. 3, on syndics, for failing to comply with its provisions in regard to the depositing in bank of money belonging to the estates administered, is for the benefit of the estates, and not of any individual creditor. *Id.*

88. The syndic of the creditors of an insolvent is their agent, and, like other agents, is bound to show due diligence in the discharge of his mandate, and to render a full and complete account of every item of property coming into his possession, supported by the necessary vouchers, showing how such property has been disposed of. With regard to the debts due to the estate, he is bound to show what portion has been paid, what proceedings have been had to enforce payment, or what reasons existed for not enforcing it. any creditor has a right to call for such an account, and the burden of proving its correctness will be on the syndic. *Prieur &c. v. their creditors*, 2 R. R. 541.

89. The syndic of the creditors of an insolvent will not be entitled to his commissions, until it is fully proved that he has faithfully and diligently administered the estate. *Id.*

90. A tableau of distribution filed by the syndic of the creditors of an insolvent as a final one, having been opposed by a creditor who had been put on it as entitled to a certain sum, was homologated so far as not opposed. Afterwards, on the trial of the opposition, there was a judgment declaring the tableau a provisional one, ordering the funds to be distributed in conformity thereto, and refusing to discharge the syndic, or to allow his commission; for which judgment both the opponent and the syndic appealed, the appeal taken by the latter being only devolutive. On a rule by the opponent on the syndic to show cause why the amount for which he had been placed on the tableau, should not be paid to him: *held*, that the appeal of the syndic being devolutive only, and the object of the rule being merely to enforce the judgment, the rule should have been made absolute. *Id.*

91. Under article 722 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immoveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless. *Campbell v. his creditors*, 3 R. R. 106.

92. Article 301 of the Code of Practice, which declares that the sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment, alleging that the defendant has no other pro-

perty to pay his debts, and pray that the proceeds may be brought into Court, to be distributed among all the creditors of the defendant, according to the order of their respective privileges or hypothecations, makes a provision in favor of the creditors who have a *higher privilege* than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure. *Campbell v. his creditors*, 3 R. R. 106.

93. In contests between the creditors of an insolvent, the confessions or acknowledgments of the latter are not evidence. Such declarations are presumed to be fraudulent. *Blackstone v. his creditors*, 3 R. R. 219.

94. A debtor who, being unable to pay all his debts at the moment, transacts with his creditors and obtain from them a delay, is not an insolvent. The concession of a respite is based upon the supposed solvency, or eventual ability of the applicant to pay all his debts. The laws relative to respite are not insolvent laws. *Rash v. his creditors*, 3 R. R. 407.

95. A creditor of an insolvent, in whose favor a judgment has been rendered, on a tableau of distribution, securing him a privilege or mortgage, must be made a party to any appeal, taken by another creditor, or the syndic, for the purpose of reversing such judgment. *Garcia &c v. their creditors*, 3 R. R. 436.

INSURANCE.

1. The plaintiff established his claim for a less sum than demanded and had judgment, and the only defence was want of an insurable interest, which was conclusively proved; and judgment was confirmed. *Berthoud v. Mississippi Marine and Fire Insurance Company*, 13 L. R. 481.

2. Where there is nothing in the policy of insurance which renders the insurers liable for the acts of the captain or officers of steam-boats, their liability for their conduct must depend on the law. *Herman, Briggs & Co. v. Western Marine and Fire Insurance Company*, 13 L. R. 516.

3. Where the testimony of the officers of steam-boats states that it is usual to take vessels in tow in their voyages up and down the river it cannot have effect against the insurers, when there is no evidence as to the *usage* of insurance in such cases, or whether such a privilege is or is not stipulated in the policies. *Id.*

4. The business of towing ships and vessels is entirely separate and distinct from all things connected with or incidental to the navigation of the river by steamboats, or the transportation of freight and passengers. *Id.*

5. So, where a steamboat was lost by the conduct of the captain

in attempting to proceed on his voyage with a brig in tow lashed along side in stormy weather, and it does not appear there was any clause in the policy allowing the privilege of taking vessels in tow, or that the insurers acquiesced in this usage, the insured cannot recover of the underwriters. *Herman, Briggs & Co. v. Western Marine and Fire Insurance Co.*, 13 L. R. 516.

6. Where the agent of the insured made his written application, and the rate of *premium* was marked on it by the secretary of the office, but not signed by him, and he expressly informed the agent that the policy would not be delivered until the *premium* was paid, and in the mean time the vessel insured was destroyed by fire, five days after the application: *held*, that the contract of insurance was not complete, the *premium* not being paid nor the policy delivered, and the underwriters were discharged. *Berthoud v. Atlantic Insurance Company*, 13 L. R. 539.

7. No contract is complete without the assent of the parties. In reciprocal contracts it must be expressed. In this case the assent of the defendants was wanting. The proposition to insure was accepted with a condition which was never complied with. *Id.*

8. When the insured settled with the underwriters for a partial loss, and gave up their policy without notifying them of a claim pending in the admiralty Court for salvage, which if successful would increase the loss: *held*, that the insured cannot recover of the insurers for any further loss they may sustain on account of salvage decreed on the salvor. *Batre et al. v. Louisiana Insurance Company*, 13 L. R. 577.

9. Had the insured notified the insurers at the time of the settlement of this outstanding claim, a different case would have presented itself. *Id.*

10. A general average contribution arises from a sacrifice deliberately made of property of one of the parties in the adventure, for the benefit of the others, whereby his loss is their gain. *Barelli et al. v. Hagan*, 13 L. R. 580.

11. The owners of the slaves are bound to contribute for them to a general average, occasioned by a jettison from the ship in which they are shipped, and on board at the time. *Id.*

12. It is the duty of captains of steam-boats passing in and out of the Mississippi, on arriving at the pilotage ground to take on board a regular commissioned or competent pilot; otherwise it is a breach of the warranty of insurance which will discharge the underwriters. *Witney et al. v. Ocean Insurance Co.*, 14 L. R. 485.

13. It is not sufficient to show that the captain of the boat was skilful and experienced to discharge the insured from their warranty of seaworthiness, when the boat has been lost, without taking a pilot on board. *Id.*

14. The bare possibility that a right to property might hereafter arise cannot be considered as an insurable interest. *Macarty v. Commercial Insurance Company*, 17 L. R. 365.

15. To have an insurable interest in any subject on property, a person must be liable to a direct and immediate loss by its damage or destruction. *Macarty v. Commercial Insurance Co.*, 17 L. R. 365.

16. So, where a party has parted with all his insurable interest in property, before its destruction, he cannot recover. *Id.*

17. A policy of insurance against fire is a *personal* contract of indemnity with the insured; and if the latter parts with all his interest in the property before the loss happens, the policy becomes void, unless it has been assigned to the new proprietor with the assent of the underwriters. *Id.*

18. Although a vessel may be old, and when injured by sea accidents, requires more repair than a new one, yet the insurers are nevertheless bound for the necessary repairs to place her *in statu quo*. *Fisk v. Commercial Insurance Company*, 18 L. R. 77.

19. The insurers are liable for damages done to zinc, occasioned by the salt-water getting to and corroding it on the voyage. *Cogswell v. Ocean Insurance Company*, 18 L. R. 84.

20. As the administrator of his wife's property, the husband has such an interest and right therein, as authorizes him to insure it even in his own name without declaring the nature and extent of his interest. *Clarke et ux. v. Firemen's Insurance Company*, 18 L. R. 431.

21. Where the policy has reference to furniture generally in a house which is described, without mentioning that part of it was stored in the garret, it is sufficient to authorize a recovery for the loss. *Id.*

22. Where the insured sells the property covered by the policy, and afterwards takes it back on account of the non-payment of the price, and is in possession at the happening of the loss, he will recover, although a clause in the policy provides, it shall be void in case of transfer or assignment, without the consent of the insurers. *Power, tutrix, &c. v. Ocean Insurance Company*, 19 L. R. 28.

23. By the implied resolutory clause in her sale, the plaintiff was restored to the possession and ownership of her property before the loss, as if no transfer had taken place. *Id.*

24. It is sufficient if the insured has an interest in the property, at the time of insuring, and at the happening of the loss. *Id.*

25. The bill of lading is sufficient evidence of ownership to entitle the shipper to recover the insurance, even against the testimony of witnesses to the contrary. *Page v. Western Marine and Fire Insurance Company*, 19 L. R. 49.

26. A fair and *bona fide* sale of damaged property, under circumstances, that render its shipment to the port of destination impossible, except in a very damaged condition, is the best that can be done for all concerned, and the underwriter cannot complain. *Id.*

27. The master of a boat or vessel, whose cargo is damaged by the perils insured against, so as to render its re-shipment inexpedi-

ent and unprofitable, has authority to sell it for the best price at the place, and for the benefit of all concerned. *Vaughan v. Western Marine and Fire Insurance Company*, 19 L. R. 54.

28. The effect of a valid abandonment of the object or property insured, is to transfer it to the underwriters, who take the place of the insured. *Hooper et al v. Whitney*, 19 L. R. 267.

29. The underwriters are subrogated to the rights of the insured by the abandonment, which also goes to include the *spes recuperandi*. *Id.*

30. So, a sale of a vessel at the port of necessity by the master under necessitous circumstances, vests the purchaser with a good title. The insured, after abandonment, cannot set up any claim or maintain an action against the purchaser to recover her. *Id.*

31. *Memorandum* articles are liable to no constructive or total loss, so long as they continue of *any value*, although they are so damaged as to be rendered absolutely of no value, still if they remain *in specie*, or can be designated by the same name, the underwriters are not liable for a total loss. *Skinner & Kennedy v. Western Marine and Fire Insurance Company*, 19 L. R. 273.

32. So, where a boat loaded with pork in bulk, some flour and beans, was partly consumed by fire, but the bottom floated on to the port of destination with about 11 per cent of the cargo of pork; it being much roasted and barbecued, but was still recognized as pork: *held*, that the insurers were not liable for a total loss. *Id.*

33. The fact of the property of the insured, being purchased by his son at a sale made by the master of the damaged cargo, is not sufficient to prove that the purchase was made on account of his father, or in any manner to affect the validity of the sale. *Vaughan v. Western Marine and Fire Insurance Company*, 19 L. R. 276.

34. A competent crew is necessary to the seaworthiness of a boat or ship; but if one is provided, the occasional absence from the vessel of a hand or seaman, on the business of the voyage, does not defeat the policy; especially when his presence could not have prevented the accident. *Caldwell et al. v. Western Marine and Fire Insurance Company*, 19 L. R. 42.

35. A strong case of necessity is required to justify a master in selling his boat or vessel and cargo, if other means of saving either be within his reach. But where he acts with fairness, and uses all proper diligence to save both, he will be justified by the necessity of the case, in selling both the boat and cargo. *Id.*

36. The master of a boat, whose cargo is materially damaged by one of the perils insured against, is not bound to wait a great length of time, at a heavy expense, to overhaul, repack and reship the cargo, when but little or nothing would be saved. He may exercise a sound discretion and sell it in its damaged state for the best price and benefit of all concerned. *Robertson et al. v. Western Marine and Fire Insurance Company*, 19 L. R. 227.

37. The purchase of property, damaged by the perils insured against, by the owner, who has been insured, is illegal and has the effect of revoking his abandonment, and turning the total into a partial loss, which is all that can be recovered. *Robertson et al. v. Western Marine and Fire Insurance Co.* 19 L. R. 227.

38. After abandonment the insured became the agent of the underwriters, and standing in that relation, he cannot purchase, except with consent of his principals. The master and owners both become agents of the insurers, on abandonment. *Id.*

39. Custom or usage in the country, of owners buying in their property, when sold as damaged for account of the underwriters, cannot justify *that* which by the law of insurance has been held to be unlawful. *Id.*

40. In an action on a policy of insurance, an allegation in the petition that the defendants were legally put in default, will be sufficient, without expressly alleging a compliance in detail with the provisions of the policy, where such compliance is proved on trial. *Mason v. the Louisiana State Marine and Fire Insurance Company*, 1 R. R. 192.

41. The contract of insurance is, essentially, one of indemnity; and this indemnity must be adjusted on the principle of replacing the insured, as near as may be, in the situation he was in at the commencement of the risk. The amount of insurable interest is the market value of the articles at the time and place of the commencement of the risk; and where they have been purchased near that time and place, the cost to the assured is the most satisfactory, though not the only criterion of their value. *Marchesseau v. the Merchant's Insurance Co. of New-Orleans*, 1 R. R. 438.

42. Under a policy of insurance, which provided that if there should be any false swearing on the part of the assured, he should forfeit all claim to the policy, a failure by the latter to sustain his affidavit, by direct evidence, to the amount claimed, will not be considered as proof of his having sworn falsely, and thereby forfeit the insurance. In open policies, it is often extremely difficult to prove the actual value of the goods lost; it suffices to show by testimony the great probability of the truth of the affidavit; and in weighing this testimony, the character of the assured, as well as the credibility of the witnesses must be considered. *Id.*

43. Where an agent, whose duty it was to procure insurance for his principal, neglects to do so, he will be responsible for any loss which may result from his neglect. *Strong v. High*, 2 R. R. 103.

44. Under a policy of insurance on a house, with the condition that, in case of loss, the assurers may either rebuild, or pay the amount of the loss as soon as proved, rent for the period occupied in rebuilding or repairing, cannot be recovered as part of the indemnity due to the assured. Such rent formed a distinct insurable

interest. *Pontalba v. Phoenix Insurance Co. of London*, 2 R. R. 131.

45. The general principle, that the assurers are bound to adjust a loss upon the principle of replacing the assured, as near as may be, in the situation they were in before the fire, has never been understood to extend to the profits or fruits which the latter was drawing, or might have drawn from the thing insured. *Id.*

46. The owner, or tenant of a house, insuring against fire, is not bound to disclose or communicate to the insurers the names or pursuits of subtenants living on the premises. If the insurers wish to guard against the risk from certain pursuits or occupations of tenants or subtenants, they have it in their power to insert in the policy a warranty to that effect, which being a condition precedent, whether material or immaterial to the risk, must be complied with, before any action can be maintained on the policy. *Lyon v. Commercial Insurance Co.*, 2 R. R. 266.

47. The owner of a house which has been insured has a right to have it occupied by any one he pleases, provided the occupations of such persons, or the property placed in the house, is not of a nature to vitiate the policy under the conditions relative to hazardous or extra hazardous risks. *Id.*

48. Where a stock of goods in a house are insured, the manner in which the rest of the building is occupied, cannot affect the policy, unless some warranty has been made in relation thereto, or there has been a concealment or misrepresentation of facts deemed by the jury material to the risk. *Id.*

49. Where pending the negotiations for a policy, the insurers expressed an objection to insuring property in the neighborhood of gambling establishments, and the applicant knew at the time that there was such an establishment within the premises in which the property was insured, it will be left to the jury to say whether this was a fact the concealment or misrepresentation of which was so material to the risks as to vitiate the policy. It is of no consequence whether it was considered material to the risk by the insurers; it must be considered so by the jury. Where a fact, not provided for by a warranty on the face of policy, is concealed, it cannot affect the right to recover, unless material to the risk, when it avoids the policy on the ground of fraud or of its having misled the insurers; and in all such cases, the materiality of the facts concealed or misrepresented must be left to the jury, who are the proper judges whether the risk has been thereby increased. *Id.*

50. Seaworthiness is an implied warranty in every contract of insurance. It is a condition precedent, without which the liability of the insurers cannot exist, although the unseaworthiness may result from some vice or defect unknown to the insured. *Dupeyre v. Western Marine and Fire Insurance Company*, 2 R. R. 457.

51. Where a vessel is lost in consequence of some of the perils insured against, the presumption is in favor of her seaworthiness;

and it is incumbent on the underwriters to show that this warranty has not been complied with. But where a loss occurs which cannot be ascribed to stress of weather or accident, the presumption will be that the vessel was not seaworthy; and the burden of proof must be on the insured. *Dupeyre v. Western Marine and Fire Insurance Co.*, 2 R. R. 457.

52. A policy of insurance protects against extraordinary accidents and perils; but cannot be considered as securing indemnity for natural decay and ordinary wear and tear. *Id.*

53. The party insured will be responsible for any loss, occasioned by want of proper care on the part of his agents. *Id.*

54. Although, generally, the warranty of seaworthiness refers to the commencement of the risk, the fact of being seaworthy then does not satisfy the warranty. The vessel must be kept in a seaworthy condition, or restored to it in the successive stages of the voyage, so far as it depends on the insured or his agents. *Id.*

55. Plaintiffs, who were grocers, had two policies of insurance in their stock in trade. Having subsequently purchased the stock of another grocer, which had been insured by the defendants, they removed their own stock to the establishment of their vendor, whose policy had been transferred to them with the consent of defendants. Plaintiffs also obtained from their own insurers transfers of the policies on the stock in their former establishment, to the same stock in the store to which they removed. The policies contained the usual clause requiring notice to the insurers, and an endorsement on the policy, of any other insurance elsewhere on the same stock, on pain of forfeiture. Plaintiffs omitted to notify defendants of the two insurances, previously existing on their stock. The stock being injured by fire, in an action against defendants: *held*, that by consenting to the transfer of the policy to the plaintiffs, defendants became the insurers of the stock in trade of the former in the store to which they removed, which stock consisted of the goods originally covered by their policy, and of plaintiffs' stock in their former store; that the latter were bound to give defendants notice of the two insurances previously existing on their stock; and that having failed to do so, they cannot recover. *Walton v. Louisiana State Marine and Fire Insurance Company*, 2 R. R. 563.

56. Where a policy of insurance provides that, in case the insured have any other insurance against loss by fire on the property, not notified to the insurers, nor mentioned in or endorsed upon the policy, or shall afterwards make any other insurance thereon, and shall not, with all reasonable diligence, give notice thereof, and have the same endorsed on the policy, or acknowledged in writing, the policy shall be void, proof that another policy was obtained on the property, which was not notified to the insured, will discharge the latter from all liability. *Bataille v. Merchant's Insurance Company of New-Orleans*, 3 R. R. 384.

57. Where one of the conditions of a policy against fire requires,

as part of a preliminary proof, without which no recovery can be had, a declaration under oath, whether any, and what other insurance has been made on the same property, the insured will forfeit his right to recover by failing to comply with the condition. *Bataille v. Marchant's Insurance Co. of New-Orleans*, 3 R. R. 384.

58. One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk. *Bell v. Firemen's Insurance Company of New-Orleans*, 3 R. R. 423. *Bell v. Western Marine and Fire Insurance Company*, 3 R. R. 428.

59. To entitle a party to recover on a policy of insurance, he must have had an interest in the thing insured at the time of the loss, as well as at the date of the insurance; and the character of their interest cannot be changed, between the date of the insurance and that of the loss, without the assent of both parties. *Id.*

60. Plaintiffs, owners of a policy of insurance on freight, finding their port of destination in a state of blockade, abandoned the voyage, and returned without insisting upon receiving their freight. There was a provision in the policy that, the assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall, in such case, have liberty to proceed to another port not blockaded, and there end the voyage, or wait a reasonable time for the blockade of the original port of destination to be raised. In an action for the amount of the policy: *Held*, that this clause did not authorize the owners to break up the voyage; and implied nothing more than a consent, on the part of the insurers, to take the risk of proceeding to another port, or of waiting a reasonable time for the blockade to be raised. *Marks v. Louisiana State Marine and Fire Insurance Company*, 3 R. R. 454.

INTERDICTION.

1. Suits for the interdiction of idiots or insane persons, must be brought in the *Probate Court*, and all the proceedings had there. The Parish Court, although it be the same judge, is without jurisdiction *ratione materiæ* to try such cases. *Segur v. Pellerin*, 16 L. R. 63.

2. In a suit for interdiction, service of petition and citation must be made on the person sought to be interdicted, in the same manner as in other cases. It is not sufficient for the attorney appointed to defend him, to accept service. *Id.*

3. A judgment of interdiction rendered on *ex parte* testimony, is erroneous, and will be reversed on appeal. *Id.*

4. The law requires that the person intended to be interdicted, should be notified of the suit; and have an opportunity to employ his own counsel, before any is appointed by the judge. *Id.*

INTEREST.

1. Where the purchaser stipulated to pay interest annually on the price of a plantation, and there is no evidence to justify him in withholding payment, he can only be relieved by demanding the deposit of the price. *Hampton et al. v. Barrett*, 13 L. R. 338.

2. Interest will not be allowed on damages arising on protested bills of exchange. *Crosby v. Morton et al.*, 13 L. R. 357.

3. Interest cannot be allowed on an unliquidated demand. *Goldenbow v. Wright*, 13 L. R. 371.

4. Where usurious or *compound* interest has been paid, the party cannot recover it back, or have it deducted, when sued for the principal debt. *Poydras v. Turgeau*, 14 L. R. 34.

5. And where the extension of the day of payment was *conditional*, depending on the punctual annual payment of the accruing interest, and the debtor fails to pay the interest punctually, still the creditor cannot sue for the recovery of the *principal debt and interest*, until the expiration of the extended time, without putting the debtor *in morâ*. *Id*

6. A party cannot recover back usurious interest or discount which he has voluntarily paid, either by a direct action or exception. *Merchant's Bank v. Gove* 15 L. R. 378.

7. In a contract between the vendor and vendee, where the latter has had the use and enjoyment of the property, he cannot demand interest on the price he has paid, in case of eviction under the mortgage retained. *Miles v. his creditors*, 16 L. R. 35.

8. So, in a contract between two creditors of the proceeds of mortgaged property in the hands of a syndic, to be allowed their respective claims, the vendee who had paid part of the price, was in possession and had the use, but gave up the property, cannot *claim interest*, which is satisfied by the use and enjoyment of the property. *Id*.

9. Interest will be allowed on an open account from another State, where a statute of that State is in evidence, authorising it and fixing the rate. *Lesesne & Edmondson v. Cook*, 16 L. R. 58.

10. Where there is no evidence of the rate of interest in the State where the obligation sued on was made, it must be assumed as the same rate of legal interest in this State. *Patterson v. Garrison*, 16 L. R. 557.

11. When legal interest is the consequence of the debt or obligation, without stipulation, a demand of the principal is a demand both of principal and interest; the one necessarily follows the other, even when the latter is not claimed in the petition. *Duke of Richmond et al. v. Milne's executor et al., on re-hearing*, 17 L. R. 328.

12. So interest on a particular legacy is due from the day of demand of its delivery, arising *ex morâ*, depending on the lapse of time the legatee is deprived of the use of it; being a legal conse-

quence of the debt or obligation and may be allowed without being specially claimed in the petition. *Duke of Richmond et al. v. Milne's executor et al., on re-hearing*, 17 L. R. 328.

13. Where a note does not bear interest on its face, but the act of mortgage taken to secure its payment, stipulates for the payment of 10 per cent interest from *maturity* of the note until paid, the excess charged from its date will be deducted. *Roasenda v. Zabriske, f. m. c.*, 18 L. R. 346.

14. Where notes, given for the price of property producing fruits and revenues, are by agreement or otherwise to remain deposited and payment suspended until defects in the title are cured; on their restoration, payment of the interest arising *ex morâ* will be decreed, as a compensation for the fruits of the thing sold, when it remained in the enjoyment of the vendee. *Ball et al. v. Le Breton et al.*, 19 L. R. 147.

15. The purchaser who wishes to relieve himself from the payment of interest, must avail himself of the faculty given him to *deposit the price* due by him. *Id.*

16. Legal interest from judicial demand on liquidated claims will be allowed, when the party was first in delay. *Brownson v. Fenwick*, 19 L. R. 431.

17. Where a note is made payable at a future period, with interest from date if not punctually paid, such interest is in the nature of a penalty for not punctually performing the principal obligation, and the failure to do so must be strickly proved, to entitle the plaintiff to recover the additional interest. Where such a note was payable at a particular place, proof that it was presented and demand of payment made at such place, after it fell due, will not entitle the holder to recover the additional interest. *Glover and others v. Doty*, 1 R. R. 130.

18. In an action on a note, not protested at maturity, where the defendants have not been put in default before suit, and there is no evidence of any promise to pay interest, it will only be allowed from judicial demand. *Pawling v. Houren and others*, 1 R. R. 229.

19. The penalty, provided by the twentieth section of the charter of the New-Orleans Canal and Banking Company, which declares that if the company shall suspend or refuse to pay any of its notes, deposits, or other obligations, in specie, that the party may recover interest at twelve per cent a year from the time of such suspension or refusal, cannot be recovered without a demand and failure to pay on the part of the company; and such interest can only be recovered from the time of the demand and failure. *Bartlett v. New-Orleans Canal and Banking Co.*, 1 R. R. 543.

20. Interest will be allowed on the amount of the damages on protested bills or notes. *Bank of the United States v. Merle*, 2 R. R. 117.

21. Conventional interest can be recovered only where there

has been an agreement, in writing, to pay it. *Burkner v. Chapman*, 2 R. R. 360.

22. Interest cannot be allowed on the items of an open account, unless a balance has been struck. *Id.*

23. The holder of a note given for the price of a slave, will be entitled to interest from maturity, though the note contained no stipulation to that effect, and was not protested. C. C. 2531, 2532. *Gay v. Kendig*, 2 R. R. 472.

24. A claim for conventional interest must be established by written proof. C. C. 2895. *Lambeth v. Burney*, 3 R. R. 251.

25. In an action, on an open account, against the heirs amongst whom a succession has been partitioned, for articles furnished to the ancestor, interest will be allowed from judicial demand and not from the death of the ancestor. *Burney v. Brown*, 3 R. R. 270.

26. When the rate of interest to be charged by a Bank on loans or discounts is limited by its charter, it cannot stipulate for a higher rate on the amount of any loan or discount, in consideration of its forbearance to sue. *Exchange and Banking Company of New-Orleans v. Boyce*, 3 R. R. 307.

27. An account bears interest from its liquidation; and will be considered as liquidated from the time when it was rendered, if not objected to within a reasonable period. *Shaw v. Oakey*, 3 R. R. 361.

28. Where in a sale of goods a time for payment is fixed, an agreement to pay interest may be implied. *Id.*

29. An unliquidated account bears interest from judicial demand. *Id.*

30. A payment cannot be imputed to the reduction of the principal where any interest is due. C. C. 2160. *Id.*

INTERPRETATION.

1. The act of 25th March, 1831, relative to injunctions, is one of great severity and must be rigorously construed. It applies only where judgments have been enjoined; in all other cases, the parties must be left to their action on the bond. *Griffin v. Cotten*, 1 R. R. 142.

2. In the construction of a statute, effect must be given, if possible to every part. *City Bank of New-Orleans v. Huie*, 1 R. R. 236.

3. The law authorising the redemption of land sold for taxes, will be interpreted liberally. *Winchester v. Cain and another*, 1 R. R. 421.

4. Where there is any ambiguity in a judgment, it must be understood with reference to the verdict on which it is based, and

which it must follow. *Black v. Catlett and another*, 1 R. R. 540.

5. Where the meaning of an instrument is uncertain, the record of another suit, by a different plaintiff, but to which the defendant was a party, will be admissible in evidence to show, by the acts and declarations of the latter, what his understanding of the instrument was. The present plaintiffs not having been parties to the suit, cannot avail themselves of the statements in the pleadings as judicial admissions, absolutely conclusive of the rights of the defendant. They must be considered simply as other declarations. *Wells v. Compton*, 3 R. R. 171.

6. In the interpretation of contracts, the intention of the parties is to be ascertained, and effect given to it, and to all the clauses of the contract. No construction is to be given which will render important expressions useless. The intention must be determined by the words of the contract, if possible; but where the intention is doubtful, the interest of the parties, or other contracts, may be referred to. Where a clause is susceptible of two interpretations, it must be understood in that sense in which it will have some effect. So, the manner in which it has been executed, or acted under, by both parties or by one, with express or implied assent of the other, also furnishes a rule of interpretation. Finally, in doubtful cases the construction must be against the party who has contracted the obligation. *Id.*

7. Where the intention of the parties to a contract is doubtful, under art. 1951 of the Civil Code, the Court will inquire into the whole conduct of the parties in relation thereto. *Id.*

8. In all surveys, courses and distances must yield to natural and ascertained objects. *Id.*

9. Where a mortgage recites that the mortgagor wishes to place the mortgagee *à l'abri de ses avances d'argent, et des effets des endossements que celui-ci voudra bien lui fournir*, it will be considered as having been given to secure past, as well as future advances. *Suc-cession of De Armas*, 3 R. R. 342.

10. Acts granting mortgages will, in cases of doubt, be strictly construed. *Id.*

INTERROGATORIES.

1. Where interrogatories are propounded which may appear immaterial, yet when fraud is alleged, the Court is not authorised to dispense with having them answered, when they are not clearly improper. *Cecile, f. m. c. v. St. Denis, f. w. c.*, 14 L. R. 184.

2. Where a firm is interrogated on facts and articles, and one of the partners answers categorically, it is sufficient, unless each of the partners has been expressly called on to answer. *Tiernan et al. v. Noé*, 15 L. R. 119.

3. The right of being present when interrogatories are answered, is secured only to the party who requires his adversary to answer in open Court. *Tiernan et al. v. Noé*, 15 L. R. 119.

4. Where the plaintiff's attorney *consented* that the facts set forth in certain interrogatories propounded to them by the defendants, touching the ownership of the notes sued on, should be *taken for granted*, in order to prevent delay in the trial, the admission or confession cannot be recalled or disregarded, and the adverse party may avail himself of it after judgment. *Shipman & Ayres v. Haynes et al.*, 15 L. R. 363.

5. Interrogatories by the defendant to the plaintiff, though sworn to be material to the defence, will be struck out, when evidently propounded only for delay. *Parker v. Hewitt*, 1 R. R. 11.

6. A manifest evasion by a party to a suit to answer the interrogatories propounded to her, creates a violent presumption that a true and direct answer would destroy her claim, and amounts to such a neglect or refusal as will authorize the Court to take them for confessed. *Knight v. Murchison*, 1 R. R. 31.

7. On a rule against a party to show cause on a certain day, why the interrogatories propounded to her by the plaintiff, should not be answered or taken for confessed, the Court may, on failure of the party to appear or answer, make the rule absolute, and order the interrogatories to be taken for confessed at once, and without any further delay. *Id.*

8. On a question whether due diligence has been used to answer the interrogatories, the decision of the judge below will not be interfered with, unless clearly erroneous. *Id.*

9. Where a party residing abroad comes into our Courts in the prosecution of his rights, he is in contemplation of law present like other suitors residing in the State, and is subject to the same rules and obligations; and where interrogatories are propounded to him, it is the duty of his counsel to take notice of them, and, as he is under a legal obligation to answer, and it is for his convenience that a commission issues, he must take the necessary steps to comply with the law in such a manner that his answers may be used as evidence in the case. It is not for the party calling for the answers, to take out a commission, or to incur the trouble and expense of attending to its execution. *Clarke v. Jones and another*. 1 R. R. 78.

10. Where interrogatories are propounded to a party to a suit not residing in the Parish, reasonable time should be allowed him to answer; and if sufficient time has not been allowed, the party wishing to use the answers as evidence, must move for a continuance, or they will be considered as waived. *Id.*

11. Where an absent party to whom interrogatories were addressed, appears to have honestly intended to comply with what was required of him, his adversary, who has, by a technical objection, excluded the testimony which he had himself called for, will not be

allowed to avail himself of such irregularity, to have the interrogatories taken for confessed. He should be satisfied to exclude them as evidence against himself. *Clarke v. Jones and another*, 1 R. R. 78.

12. A supplemental petition containing no new allegations, and filed for the sole purpose of propounding interrogatories, to which the defendant has neglected to answer after sufficient time, may be withdrawn, by leave of the Court, after the case has been called for trial. *Mackin and others v. Rowley*, 1 R. R. 82.

13. In a suit against a corporation the individual stockholders are not cited, but only those agents or officers whom the law designates as managers of its affairs; such stockholders do not occupy the position of actual defendants, who must be interrogated on facts and articles, but may be summoned by the opposite party as witnesses to testify against their interest. *Hart v. the New-Orleans and Carrollton Rail Road Company*, 1 R. R. 178.

14. One who wishes to probe the conscience of his adversary, must bring himself strictly within the exception established by law to the rule which excludes a party from testifying in his own case. *Martin v. Wright*, 1 R. R. 299.

15. A party to a suit can only be examined by interrogatories annexed to the petition or answer, unless with his consent. He may object to being verbally examined on the trial. *Id.*

16. Where one of the parties to a suit is called upon to be sworn and examined on the trial, without any specific interrogatories having been previously propounded to him, he must be considered as called upon as any other witness, and be allowed to testify generally. Where the other party desires to confine his examination to certain facts, he must pursue the course pointed out by the law for the examinations on facts and articles. *Id.*

17. The proceeding under the 13th section of the act of 20th March, 1839, authorising a plaintiff to propound interrogatories to third persons touching any property in their possession belonging to the defendant, or any debt which they may owe to the latter was intended to enable the plaintiff to get at property belonging to the defendant, in the possession of third persons; but it cannot be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in the possession of such third persons. The latter cannot be deprived, by such a proceeding, of any advantage, or means of defence, they would have in a direct action against them. *Laville v. Hebrard and another*, 1 R. R. 435.

18. Facts appearing from interrogatories to third persons, which a party had no right to propound, will not be noticed. *Id.*

INTERROGATORIES AND DEPOSITIONS.

1. Either party has a right to interrogate his opponent; and

the penalty for not answering is, that the interrogatories are to be taken *pro confesso*. *Baine v. Wilson*, 18 L. R. 59.

2. The party propounding interrogatories has only to obtain the order of Court to have them answered. The adverse party is bound to answer at his peril. *Id.*

3. Where the answers are to be taken out of the Parish, a commission issues, and the party interrogated on notice of the time and place of answering given, answers so that the person propounding the interrogatories may be present. *Id.*

4. A commission is necessary to take the answers to interrogatories out of the State, in like manner as for a distant Parish within it. *Id.*

5. The mere production of a commission is not sufficient to authorize the person to administer an oath and take the answers, as it does not prove he is the actual person named in the commission, who swore the party. *Id.*

6. A commission from the Governor that such a person was a magistrate in 1838, does not establish the fact, that he was one in 1840, *the time when he acts as such*. *Id.*

7. When a commission is directed to a person by name no proof of his authority or identity is required, but when directed to *any judge* or justice of the peace out of the State, it must be shown that *he is such an officer*, at the time he acts and purports to be. *Id.*

8. When the answers to interrogatories make out the plaintiff's case, and are not disproved, he will have judgment. *Beach et al. v. Gakey*, 18 L. R. 413.

INTERROGATORIES TO THIRD PERSONS UNDER A FIERI FACIAS.

1. The proceeding under section 13, of the act of 20th March, 1839, authorising a plaintiff to propound interrogatories to third persons, touching any property in their possession belonging to the defendant, or any debt which they may owe to the latter, cannot be used as a substitute for a direct revocatory action. The object of which is to test the validity of titles to property in the possession of such third persons. The latter cannot be deprived by such a proceeding, of any advantage or means of defence they would have in a direct action against them. *Taylor v. Whittemore*, 2 R. R. 99.

INTERVENTION.

1. The article 391 of the Code of Practice, provides that one may intervene either before or after issue joined, provided the interven-

tion do not retard the principal suit; yet time must be allowed to cite the party against whom it is directed, and the same delays to answer or respond to interrogatories given, as in ordinary suits. *Ardry's wife v. Ardry, her husband; Kain & Co., et al., intervenors*, 16 L. R. 264.

2. So, where the plaintiff has treated the intervening parties as properly in Court, he must allow them the necessary delays to bring in the answers of all the necessary parties. *Id.*

3. An intervenor may produce evidence, to prove that the property attached had been transferred to third persons, before coming into his possession as owner, in order to show that the defendants had parted with their interest at the time of the attachment. *Shields et al. v. Perry, McClure et al.*, 16 L. R. 463.

4. Intervenors have no right to come in and contest the jurisdiction of the Court in which the plaintiff had a right to sue. They must take the case as they find it: and if their interests are affected, it is the result of their own acts. *Kenner & Co's syndic v. Holli-day et al.*, 19 L. R. 154.

JUDGMENT.

1. A judgment will be reversed for not containing *reasons* as required by the constitution; but when the record enables the Court to examine the case on its merits, it will render such judgment as ought to have been given by the Court below. *Burns v. Haynes et al.*, 13 L. R. 12.

2. On a motion for judgment on a bail bond against the principal and his sureties, it is sufficient to assign as *reasons* of the judgment, that the appearance bond of the accused was called, and he failed to appear in compliance with his recognizance. *State v. Gossin et al.*, 13 L. R. 96.

3. A judgment and verdict which are deficient in the forms required by law, will be annulled and set aside; but when this Court is in possession of all the facts and evidence to enable it to pronounce definitively in a case, it will render such judgment as should have been given in the Court below on the merits. *Hosed's widow and heirs v. Miles*, 13 L. R. 107.

4. Where a judgment was rendered at the instance and on the prayer of the party, he cannot be allowed to open it after it is final, and have *errors of calculation*, alleged to exist to his prejudice, corrected. *Browder's curator v. Browder's heirs, &c.*, 13 L. R. 156.

5. A judgment which assigns no reasons must be reversed; but the Supreme Court, when the record enables it, will render such judgment as ought to have been given in the first instance. *Amory et al. v. Black*, 13 L. R. 264.

6. The jury are the best judges of the facts submitted to them ; and unless an examination of the evidence shows error to induce a reversal, the judgment will not be disturbed. *Baptiste, f. w. c. v. Soulié, f. w. c.*, 13 L. R. 268.

7. Where the judgment is based on the verdict of a jury, involving questions of fact merely, which appear to have been satisfactorily proved, it will not be, disturbed. Informalities complained of, not sufficient to reverse the judgment will not be noticed. *Gooding v. Atlantic Insurance Co.*, 13 L. R. 450.

8. Three judicial days must elapse between taking judgment by default, and the day on which it is made final, or it will be reversed on an assignment of error. *Johns & Co. v. Boyle*, 14 L. R. 268.

9. Judgment may be rendered after the lapse of more than three days from that on which the verdict is found. The appellant complains with a bad grace that judgment was not rendered soon enough. *Gay v. Ardry*, 14 L. R. 288.

10. Where a judgment states that it was rendered *on due proof* of the obligations in plaintiff's petition, in which the usual allegations are made, the reasons will be deemed sufficient. *Bridge et al v. Bellow*, 14 L. R. 435.

11. The judgment alone of this Court must have effect, and is the law, independently of any expression used *arguendo*. *Hill & Gunnegle v. Bowman*, 14 L. R. 445.

12. A judgment allowing part of the demand as *an ordinary debt*, is in *personam*, although the suit was by attachment for a privileged debt. *Id.*

13. So, in a suit by attachment, the judgment is *in rem* and *in personam* for the balance not covered by the property attached, on which a writ of *ca. sa.* may issue. *Id.*

14. The allegation of fraud and collusion against a judgment, puts the party in whose favor it is rendered to the proof of the facts on which it is based. *Adams v. his creditors*, 14 L. R. 454.

15. Where there is a judgment of eviction decreeing the land to the plaintiff, and providing that she shall pay the defendant a certain sum for his improvements, before she takes possession, and the judgment fixes no time, the defendant may have execution, immediately for the sum awarded him. *Righter et ux. v. Winter*, 14 L. R. 548.

16. A judgment on a petition for an order of seizure and sale of the mortgaged premises, which has been opposed, *without saying against whom*, for the whole amount of the plaintiff's claim, is insufficient to authorize a seizure and sale under a *fieri facias* issuing thereon. *Bailly, f. m. c. v. Percy, f. w. c.* 14 L. R. 17.

17. Where a judgment by default is confirmed after answer filed to the merits, with a prayer for a jury, it vitiates the proceedings, and the case must be remanded. *French v. Putnam et al.*, 14 L. R. 97.

18. Where the plaintiffs discontinue their suit, and afterwards

revive or renew it on a rule to show cause, served on the adverse party and obtain judgment, although not appealed from, it is *insufficient* on which to found an action against a third possessor. *Gilbert et al. v. Nephler & Boyle*, 15 L. R. 59.

19. When a judgment is relied on as the only evidence of a debt, for which the property of a third possessor is attacked, it is but fair, and he has the right to open it, and inquire into the manner in which it has been obtained. *Id.*

20. Where judgment, set up as the basis of an action against third persons, is attacked as fraudulent and collusive, it devolves on the party offering it, to prove his debt or demand by legal evidence. *Id.*

21. The amount of a judgment having been paid, the defendant therein took an appeal, and had it reversed: *held*, he should recover back the sum paid on showing these facts. *Mooney v. Corcoran*, 15 L. R. 46.

22. Where a party claimed title to a piece of land, or a sum of money for work and labor done on it, and propounded interrogatories to his adversary to establish his claim, the answers to which negatived title, but left the money demand doubtful, and the judge found a less sum than that claimed, judgment thereon was not disturbed. *Whitehead v. Albriton*, 15 L. R. 20.

23. Where judgment by consent was entered up for a thousand dollars less than the amount of the note sued on, this Court altered the judgment to the true sums without it being specified or asked in the petition, when it appeared from the notes annexed. *Brumfield v. Mortee's administratrix*, 15 L. R. 116.

24. Where the evidence is contrary to the judgment appealed from, it will be reversed, and such a one rendered as is supported by proof in the record. *McCoy's executors v. Byrne*, 15 L. R. 366.

25. No evidence can be received in the Supreme Court, that a judgment by consent, was entered up differently from the consent and agreement between the parties. *Brand v. Jones*, 16 L. R. 449.

26. A judgment of the inferior Court cannot be corrected and amended in the Supreme Court, even by consent. *Id.*

27. Where a case presents merely a question of fact, the judge *a quo*, who heard the witnesses, and saw the manner they testified, is more competent to judge of the degree of credibility to be given to their testimony, than this Court, and his judgment in doubtful cases should be affirmed. *Goulé & Lambert v. Vidal et al.*, 15 L. R. 479.

28. A judgment which is reversed by the Supreme Court and remanded for a trial *de novo*, does not settle the rights of the parties, and form *res judicata*. *Jackson v. Tiernan et al.*, 15 L. R. 485.

29. The premature signing of a judgment, as between the parties, is not assignable as error. *Opothlarholer et al. v. Gardiner*, 15 L. R. 512.

30. Where two of the original plaintiffs in a *joint action*, died after judgment, and a rule taken by the others on the surety in the bail bond to show cause why he should not pay their joint share of the judgment: *held*, that the judgment severed their *joint interest* and that each has a right to recover his *virile* share from the surety. *Opotharholer et al. v. Gardiner*, 15 L. R. 512.

31. A judgment of the Probate Court, unappealed from, appointing the plaintiff agent, with power to collect the debts of a partnership, is full authority from him to sue and recover all accounts and debts due the firm. *Brent, agent, &c. v. Cheevers*, 16 L. R. 23.

32. The *authority* of a judgment of Court, cannot be inquired into collaterally. *Id.*

33. A defendant cannot avail himself of an error in the name of his co-defendant, in a joint judgment against them. *Parker v. Brashar & Barr*, 16 L. R. 69.

34. A judgment against partners in a sugar estate, must in its form be *joint*, and against each one, separately for his proportion. *Id.*

35. An order or judgment of the Probate Court, erasing the legal and special mortgage of a minor, under the act of 1830, and giving a special mortgage *on part only* of the tutor's property, in lieu of the first, cannot be attacked collaterally, when third persons have purchased property released by these proceedings; it must have its effect, until reversed or annulled in a direct proceeding or action. *Le Blanc v. his creditors*, 16 L. R. 120.

36. So, in the suit of a minor, on arriving at the age of majority, to annul an order or proceedings of the Probate Court, it cannot affect the right of third persons who purchased under the faith of these proceedings, sanctioned by the Court of Probates. *Id.*

37. Judgment creditors of an estate in the course of administration, cannot take out execution against the administrator, without first notifying such judgment to him, that he may show he has no funds to satisfy and pay it. *Carrière & Borduzat v. Meyer et al.*, 16 L. R. 126.

38. Before the plaintiffs can issue a *fieri facias*, they must first notify their judgment to the defendant. *Guidry v. Guidry's heirs*, 16 L. R. 157.

39. So, where a judgment of partition, decreeing a balance due by an heir to his co-heirs, has not been regularly notified to him, and he was not made a party to it, he will be entitled to a perpetual injunction against such judgment. *Id.*

40. An order of seizure and sale is so far a judgment as to authorize an appeal; but it is not a judgment in the true and legal sense of the term. *Harrod v. Voorhies' administratrix*, 16 L. R. 254.

41. Judgment by default is premature, taken on the first day of the term. The defendant is allowed the first day on which to file his answer. *Bryan's administrator v. Spruell*, 16 L. R. 313.

42. In all cases of judgment by default made final, the plaintiff must prove his demand; and not having *proved the defendant's mark to the note sued on*, the judgment for the plaintiff was reversed, and the case remanded. *Bryan's administrator v. Spruell*, 16 L. R. 313.

43. Judgment affirmed as for a frivolous appeal, but it already bearing ten per cent interest only five per cent damages were allowed. *Windle v. Flint*, 16 L. R. 318.

44. Judgment entered by consent of both parties, reversing the judgment appealed from, and remanding the case for a new trial. *Sexton et al. v. Brock*, 16 L. R. 347.

45. The decree or judgment of a foreign Court, the jurisdiction of which not having been questioned, will be considered conclusive on the matters adjudged by it. *Brosnaham et al. v. Turner*, 16 L. R. 433.

46. Where there is a judgment, execution and sale of property shown, the Court will not inquire into the validity of the judgment; and when in the investigation of a title a judgment is produced, to which one of the litigants is a party, it cannot be inquired into collaterally. *Id.*

47. When a judgment is set up as the basis of the defendant's title, in a petitory action against him, its validity cannot be examined, or inquired into collaterally. Never having been reversed or annulled, it must have its full force and effect. *Brosnaham et al. v. Turner*, 16 L. R. 442.

48. Where a judgment, writ of execution and sheriff's sale are shown in support of a title, it necessarily creates a strong presumption in favor of the title, and is *prima facie* evidence that the formalities of law have been complied with. *Id.*

49. Where it is evident justice requires it, even judgment of non-suit will not be given, but the case will be remanded for new proceedings. *Legendre v. Woodrooff*, 16 L. R. 477.

50. Where a judgment is given against the defendant to be satisfied to the amount of six hundred and forty five dollars out of funds attached in the hands of the garnishee, execution may issue against the latter. *Kirkman et al. v. Hills*, 16 L. R. 523.

51. Judgment may be rendered against both the defendant and garnishee at the same time and in the same judgment. *Id.*

52. Where a judgment has been rendered against two commercial partners on the confession of one, which is on a writ of error, reversed and vacated as to the other, he is not thereby released from the debt by a merger of the debt in the judgment. *State Bank of Illinois v. Sloo & Byrne et al.*, 16 L. R. 544.

53. If judgment be obtained against one of several debtors *in solido* the others cannot resist the demand of their creditors on the ground that the debt is merged in the judgment against their co-debtor. *Id.*

54. Judgment bearing ten per cent interest, affirmed with 5 per cent damages as a delay case. *Gollain v. Jamet*, 16 L. R. 565.

55. Judgment of the Inferior Court confirmed with consent; damages being waived. *Weems v. Boyle et al.*, 17 L. R. 237.

56. Judgment not rendered between the parties cannot form the plea of *res judicata*. *Randall v. Bank of Louisiana*, 17 L. R. 273.

57. No final judgment can be rendered without an answer filed or judgment by default; not even a non-suit; and this being the case, however reluctantly, the Court will remand the case for the proper issues to be made up. *Laville v. Rightor et al.*, 17 L. R. 303.

58. Where the defendants are not all joint obligors and liable in the same manner, different judgments may be rendered and be final as to some, and the case remanded so far as it respects others. *Id.*

59. A judgment under which a sheriff's sale was made must be produced as the basis on which execution issued, and which is of itself a *prima facie* evidence of the regularity of the previous proceedings. *Childress v. Allin et ux.*, 17 L. R. 37.

60. The general rule is that the purchasers under the faith of proceedings, *apparently sanctioned* by a judgment of the Probate Court, cannot be affected by a suit of the minor seeking to annul those proceedings. *Lesassier v. Dashiell*, 17 L. R. 194.

61. A judgment not attacked as fraudulent or collusive is *prima facie* evidence that the sum, for which it was rendered, is justly due the minor in whose favor it was given. *Id.*

62. A party having obtained judgment on a note in another State, cannot sue on the note, or on an account made up from the judgment and costs. He must sue on the record of the judgment, not on a parole acknowledgement of its correctness. *Dougherty et al. v. Crumbaugh*, 17 L. R. 452.

63. The law expressly requires that all final judgments shall be signed before execution can issue. It is not enough for the judge merely to sign the minutes of the proceedings of the Court. *State v. McDonald et al.*, 17 L. R. 485.

64. Where the evidence sustained the judgment and no amendment asked by the appellee it was affirmed with costs. *Stamps v. Marigny's attorney in fact*, 17 L. R. 586.

65. The recital of the evidence given in the opinion of the Court or judge, who tries the case, is *not sufficient*. This Court must have the evidence itself. *Tait v. De Ende's executors*, 18 L. R. 33.

66. A copy of a naked judgment may be admissible in evidence, but it is not sufficient to make proof of the matters contained in it. *Id.*

67. The whole of the record must accompany the judgment of a foreign tribunal, to give it effect in our Courts. *Id.*

68. A judgment amended for allowing five, instead of four per cent interest; and for want of amicable demand, the appellee pay-

ing costs in both Courts after the appearance of the defendant. *Varion v. Debergue*, 18 L. R. 40.

69. Judgment of the Inferior Court corrected and amended by consent of parties; being erroneous on its face and the error only discovered after it became final. *Commercial Bank of Rodney v. Hinds*, 18 L. R. 49.

70. Where a judgment states, the Court being satisfied that the plaintiff's claim is correct, it is a sufficient constitutional reason to support the validity of the judgment. *Slidell v. Locke*, 18 L. R. 461.

71. The order of the Court of Probates for the registry and execution of a will and appointment of a dative testamentary executor forms a judgment which must have its effect, until reversed by appeal or action of nullity. *Derbigny v. Peirce, &c.*, 18 L. R. 551.

72. An action of a nullity of judgment will not lie unless for some one of the enumerated grounds in the Code of Practice. *Id.*

73. Appeal for delay and judgment affirmed with the maximum of damages. *Goesden v. Morrison*, 18 L. R. 584.

74. Judgment affirmed, on the abandonment of part of the defence and admissions of the defendant. *Dufour & Co. v. Meffre*, 18 L. R. 581.

75. Judgment affirmed with the maximum of damages as a delay case. *Lavigne v. Theurer et al.*, 18 L. R. 582.

76. Any objection to the amendment of a judgment, on the ground that the answer of appellee requesting it, was not filed three days before that fixed for the trial, as required by art. 890 of the Code of Practice, will be considered to have been waived, where the case was fixed by the appellant before the expiration of the three days allowed for filing the answer. *Griffing administratrix v. Caldwell and others*, 1 R. R. 18.

77. In doubtful cases the conclusion should be in favor of the party who strives to avoid a loss, rather than in favor of one who seeks a gain. *Bronaugh v. Neal*, 1 R. R. 23.

78. Where judgment has been rendered for a sum exceeding, by however small an amount, that claimed in the petition, it must be reduced to the amount prayed for. *Gasquet and others v. Vee-der and another*, 1 R. R. 68.

79. Where by agreement between the parties, a judgment has been confessed, on an express stipulation of certain conditions as to time and manner of its execution, the conditions will be obligatory. *Manadue v. Franklin and another*, 1 R. R. 122.

80. Where the circumstances authorize it, a Court may, in rendering judgment in favor of a party make its execution dependant on the condition of the production of books and papers, in the possession of the latter. *Tiernan v. Murrah and another*, 1 R. R. 443.

81. Where a judgment has been obtained against a party, in a case not expressly included among those in which the Code of

Practice prescribes that an action of nullity will lie, and he shows that he will sustain real injury unless he can obtain relief, which cannot be had on appeal and the case presents facts on which, in the other states of the Union, a Court of equity would interfere, relief may be granted; but not unless the applicant state particularly and specially the nature of the defence, and the facts on which he seeks relief, and prove that he has been guilty of no *laches*. It will not suffice, to allege that he has a good and valid defence to the action. *Chinn v. First Municipality of New-Orleans*, 1 R. R. 523.

82. Where there is any ambiguity in a judgment, it must be understood with reference to the verdict on which it is based, and which it must follow. *Black v. Catlett and another*, 1 R. R. 540.

83. Action to rescind the sale of a tract of land; verdict for the plaintiff for the land, and in favor of defendant and reconvenor for the purchase money; and decree accordingly, declaring the land to be the property of the plaintiff and ordering the defendant to put him in possession, on his paying the purchase money: *held*, that the decree contains two distinct judgments, one in favor of the plaintiff for the land, and the other for the defendant for the price; that the right to have it executed is reciprocal; and that both parties must be placed on the same footing; and that the defendant may take out an execution for the price, though the plaintiff may not have demanded the execution of the judgment in his favor. *Id.*

84. Where a judicial tribunal of another State has acted finally on a case, the legal presumption is that every thing has been done according to law; and the judgment will be evidence between the parties. *Jordan v. Black*, 1 R. R. 575.

85. A question decided by a competent tribunal of another State, after due proceedings, will not be examined into by the Courts of this State. *Id.*

86. A judgment ordering a certain sum belonging to a succession, in the hands of the executors, to be appropriated in a particular way, is not binding on a legatee not a party to the proceeding. *Succession of Milne*, 2 R. R. 382.

87. The sureties on a bond given for the release of property attached, the condition of which is that they shall satisfy whatever judgment may be rendered in the suit, though not parties to the action, may plead the nullity of the judgment, when called upon to satisfy it, their undertaking was, to satisfy any judgment legally obtained. When a judgment is absolutely null, any one having the least interest in opposing its effect, may have such nullity pronounced. *Quine v. Mayes*, 2 R. R. 510.

88. In an action against the sureties of a public officer, to recover an amount due to the plaintiffs from the latter, judgment should be rendered for the sum actually due, and not for the whole penal-

ty of the bond to be satisfied by the payment of the amount so due. *Dougherty v. Peters*, 2 R. R. 534.

89. Where several Courts have concurrent jurisdiction of actions against the sureties of a public officer, no one of them can condemn the sureties to bring into Court the amount for which they may be ultimately responsible, and discharge them from further liability. The creditors cannot be compelled to come into the tribunal for redress. The judgment should be only for the amount due to the plaintiff. *Id.*

90. The provisions of the Code of Practice art. 746, *et seq.*, authorising summary process to enforce judgments rendered in other States or in foreign countries, instead of the ordinary action on the record, which was formerly the only mode of proceeding, must be strictly pursued; and the party resorting to it must show, that he comes clearly within the law, not in appearance only, but in reality. *Miller v. Gaskins*, 3 R. R. 94.

91. Defendant having procured an order of seizure and sale, on a judgment rendered in another State against the plaintiff, a resident of Louisiana, under process of arrest, the latter enjoined the proceeding, alleging that, though it appears from the record an answer was put in for him by an attorney, that no one was authorised to appear for him, and that he never appeared or defended the action. On a motion to dissolve, on the ground that the facts alleged, though true, are insufficient to maintain the injunction: *held*, that admitting the allegations of the petition to be true, the judgment can have no greater effect than one rendered, after personal services, but without appearance, on a judgment by default; and that the motion should have been overruled. *Id.*

92. Letters of executorship, under the hand and seal of the judge of the Court of Probates, are conclusive evidence of the facts they purport to establish; nor can the jurisdiction of the judge be inquired into collaterally. *Succession of Hamblin*, 3 R. R. 130.

93. Where in an action against sureties who are bound jointly only, they claim in their answer the benefit of division, and it is not alleged that either is insolvent, the judgment must be against each for his virile portion. *McGuire v. Bry*, 3 R. R. 196.

94. Where the case requires that a judgment should be rendered for the plaintiff, directing him to be put in possession of the land sued for, on paying a sum to the defendant for his improvements, the Court will order, at the instance of the latter, that he be authorised to take out execution for the amount decreed him, if not paid within a certain time. *Milliken v. Rowley*, 3 R. R. 253.

95. By the laws of Mississippi, the forfeiture of a forth-coming bond extinguishes the original judgment; and the forfeited bond itself acquires the force and effect of a new judgment. *Briggs v. Spencer*, 3 R. R. 265.

96. In an action on a judgment obtained in Mississippi, defendant having established that the judgment had been extinguished

by the execution and forfeiture of a forth-coming bond : *held*, that there must be judgment as in case of non-suit. *Briggs v. Spencer*, 3 R. R. 265.

97. Where by the laws of a State in which a judgment has been obtained, no execution can be issued against the property of the defendant for a certain period, plaintiffs cannot, by suing on the judgment here, proceed against his property in this State, before the expiration of the delay to which defendant had acquired a right. The judgment cannot have a greater effect extraterritorially, than in the State in which it was rendered. *Id.*

98. The appointment of a tutor by a Court of Probates, can be set aside only by appeal, or by an action of nullity. Its legality cannot be inquired into collaterally. *Succession of Winn*, 3 R. R. 303.

99. Where different seizures have been made in the hands of defendant, of whatever sums may be due by him to plaintiff, on a judgment in favor of the latter, execution will be stayed until the seizures are proved to have been satisfied or abandoned. No law authorizes a judgment ordering the amount to be deposited in Court, subject to the claims of the seizing creditors. *Rightor v. Slidell*, 3 R. R. 375.

JUDGMENTS.

1. Judgment affirmed with the maximum of damages for a frivolous appeal. *Kolligs' Brothers v. Meeks*, 19 L. R. 75.

2. A judgment which has become definitive, cannot be set aside by consent of *parties*, especially when all the parties interested are not present ; nor can an attorney deprive his client of the benefit of his judgment without a special power to do so. *Morgan, Dorsey & Co. v. their creditors*, 19 L. R. 84.

3. A judgment homologating a tableau of distribution is one in favor of each creditor to whom a dividend is assigned ; and has the effect of *res judicata* in relation to the proceeds or money in the hands of the syndic. *Id.*

4. Judgment affirmed ; the record being imperfect, so as to preclude an examination of the case on the merits. *Beach & Co. v. Wagner et al.*, 19 L. R. 86.

5. A judgment obtained in the last resort is final and conclusive between the parties to it ; although it may not be so as to third persons : nor can a change by the common debtor making a surrender, affect the rights of the judgment creditors, who have a privilege or mortgage on the property ceded. *Skipwith v. his creditors*, 19 L. R. 198.

6. In a petitory action when the defendant exhibits the best ti-

tle, he will be entitled to *final judgment in his favor*, and not merely one of non-suit. *Guidry v. Woods*, 19 L. R. 334.

7. A judgment which states that it was rendered by consent of *parties*; especially when it does not appear the defendant ever was cited or made a party to the suit is illegal. *Broussard v. Broussard*, 19 L. R. 354.

8. The case depends entirely on facts and calculations made by auditors and the inferior Court, which are approved and judgment affirmed. *Parry v. Hannon*, 19 L. R. 393.

JURISDICTION.

1. In an attachment case, commenced in the Parish Court of New-Orleans, where the defendant died during the pendency of the suit, and his succession opened in a remote Parish: *held*, that the power of the Court of general jurisdiction ceased, and the cause was ordered to be transferred to the Court of Probates for the parish in which the succession was opened. *Oakey et al. v. Ducker*, 13 L. R. 375.

2. Eustis J., dissenting. Did not consider a mere auxiliary administration, in a remote parish of the estate of an intestate domiciliated out of the State, but dying in it, leaving *moveable* property under attachment in our Courts of general jurisdiction, *divested* them of that jurisdiction. *Id.*

3. It is settled in most of the States, and by the Supreme Court of the United States, that a purchaser under a decree of the orphans Court is bound to look to the jurisdiction, but that the truth of the record concerning matters within that jurisdiction cannot be disputed, and a purchaser under a decree of Court is not bound to look beyond the jurisdiction. *Lalanne's heirs v. Moreau*, 13 L. R. 431.

4. An officer of Court is liable to be sued in any Court of competent jurisdiction for a breach of duty, or for any injury or trust committed by him in the course of his official duties. *Edwards v. Nicholson*, 13 L. R. 582.

5. The Marshal of the United States is liable to be sued in an action for damages in a State Court of competent jurisdiction, for failing and refusing to deliver and convey to the plaintiff certain property which he purchased at the Marshal's sale, made under a judgment of the United States District Court. *Id.*

6. Rost J., dissenting. Was of opinion the State Courts had no jurisdiction of this case, not even the claim for damages; that the whole subject matter belonged exclusively to the District or Circuit Court of the United States. *Id.*

7. Where parties are in Court whose jurisdiction has attached, they may be required to litigate all their claims there, relating to the

property in controversy, although they reside in another State. *Frost & Johnson v. Rebout et al.*, 14 L. R. 104.

8. A defendant cannot be cited to appear in a different jurisdiction from that in which he may be found, or resides at the time of bringing suit. In such a case, one District Court cannot issue process of citation to be served within the jurisdiction of another and a different Court. *Gibson v. Huie &c.*, 14 L. R. 129.

9. A debtor having no residence or fixed domicile in the State, may be sued wherever he is found; but suit must be brought in the Court having jurisdiction over the place where he is found. *Id.*

10. Where the widow sues to recover certain property under her marriage contract, which she alleges was given to her by her husband, but is withheld and sold by the administrator and heirs: *held*, that it is an action to recover property under a title, and not a partition, and the Probate Court is without jurisdiction. *Kerr v. Kerr et al.*, 14 L. R. 177.

11. Where the Court is without jurisdiction *ratione materie*, no consent can give it, and the Court is bound to notice it *ex officio*, even when no plea to the jurisdiction is filed. *Id.*

12. Where heirs sue in the District Court, to recover from the purchaser property sold at the probate sale of their ancestor's estate, on the ground that the proceedings and sale of the Probate Court are illegal, and should be cancelled and annulled: *held*, that this is in the nature of an action of nullity and the District Court is without jurisdiction. *Grahams heirs v. Gibson*, 14 L. R. 146.

13. The Courts of general jurisdiction are the proper tribunals to take cognizance of partitions of partnership property, either in kind or by licitation, even if some of the members of firms composing the partnership are dead, and their estates in the hands of executors or administrators. *Gordon et al. v. Dick et al.*, 15 L. R. 33.

14. The Parish Court of New-Orleans has concurrent jurisdiction with the first District Court, in all cases within the limits of said parish, and which extends to actions for partition of property held in common, even if any or all the parties defendants be minors, or persons residing without the limits of the State. *Id.*

15. The jurisdiction of the Probate Court, as defined in the Code of Practice, art. 924, No. 14, is confined exclusively to partitions of successions, which are the peculiar object of that Court. *Id.*

16. The Probate Court is without jurisdiction in an action against a third possessor of property sold by a tutor, when the object of the suit is to annul certain proceedings of that Court releasing the general mortgage of the minor, and to subject the property to his claim, under his mortgage against the tutor. *Lesassier v. Lesassier et al.*, 15 L. R. 55.

17. The third possessor was no party to the probate proceedings sought to be annulled, and is not connected in any way with the

acts of the tutor; nor has he done any act under the authority of the Court of Probates. *Lesasier v. Lesasier et al.*, 15 L. R. 55

18. Courts of Probate have no jurisdiction against third possessors of property claimed as part of a succession, or under a mortgage against a tutor. If it were otherwise, defendants would be deprived of important means of defence, as fraud and collusion, and the trial by jury. *Id.*

19. The Court of Probates is *without* jurisdiction in an action on an appeal bond, or to try a rule against the surety therein, to render him liable for the judgment against his principal, although the appeal was taken from that Court. *Elkins' heirs v. Berry*, 15 L. R. 358.

20. Where heirs sue their co-heirs for a partition of property inherited from their common ancestor, in the Probate Court, and another set of heirs intervene and claim title to one-half of the property, under another and different ancestor, it involves questions of title, which must be brought before the Courts of ordinary jurisdiction. *Badon's heirs v. Foucher et al.*: *H. Badon's heirs, intervenors*, 15 L. R. 455.

21. In a contest about the right and title to property between two sets of heirs claiming under different ancestors, and which is not a necessary incident to a partition, the Probate Court is without jurisdiction. *Id.*

22. So where one set of heirs intervene in the Probate Court, and claim title to half the property, in an action of partition between co-heirs inheriting from different ancestors, their petition of intervention will be dismissed for want of jurisdiction. *Id.*

23. Where the husband seeks to recover certain property as his part of the community in his own right from the heirs of his deceased wife who claim it under her last will although he may give to his suit the form of an action of partition, yet it involves title and the Probate Court is without jurisdiction. *Breau v. Landry et al.*, 16 L. R. 88.

24. A party cannot amend his pleadings and add a nominal sum to increase the demand above three hundred dollars, so as to give appellate jurisdiction to this Court. Such a course will be viewed as an attempt, to evade the constitutional provision on this subject, and the case will be dismissed for want of jurisdiction. *Red River Rail Road Co. v. Williams*, 16 L. R. 182.

25. This Court will not suffer imaginary claims to be tacked to real ones, for the purpose of giving jurisdiction in violation of the constitution. *Id.*

26. A suit on the bond of a curatrix against her and her sureties, to render her personally liable, and recover against them individually, must be instituted in the Courts of general or ordinary jurisdiction. *Brown v. Gunning's curatrix et al.*, 16 L. R. 238.

27. The Court of Probates is without jurisdiction *ratione materiæ* in a contest between two co-proprietors of property seeking

a partition and where one is proceeding as plaintiff *à la folle enchère*, to have certain property purchased by the other at the probate sale of the joint estate, re-sold at his risk and costs. *Bray's executrix v. Bray*, 16 L. R. 352.

28. A party may sue for unliquidated damages for the non-compliance with the contract of sale, and it is clear, in such a case the Court of Probates would be without jurisdiction. It is the same if the party sues to compel a re-sale at the risk of the purchaser, although the contract of sale arose under a proceeding nominally in the Probate Court. *Id.*

29. Where the principal demand is evidently fictitious designed to give jurisdiction to the Court, the appeal will be dismissed. *Orillon v. Slack*, 17 L. R. 102.

30. This Court will not encourage attempts to evade the provisions of the constitution, limiting its jurisdiction. *Id.*

31. Where the object of the suit is to obtain settlement and liquidation of the community formerly existing between the deceased husband and surviving wife, and for a partition of the residue, after payment of the common debts, the Court of Probate has exclusive jurisdiction. *Lawson et ux. v. Ripley*, 17 L. R. 238.

32. This Court has exclusive jurisdiction of all matters concerning estates, particularly those in course of administration. *Id.*

33. Whenever a question to real property, and slaves arises collaterally in the Court of Probates, and an examination of it becomes necessary, in order to give the Court the means of arriving at a correct conclusion on matters of which it has jurisdiction, it must take cognizance of such title. *Id.*

34. Courts of Probate have *not exclusive* jurisdiction in suits for the purpose of dividing property belonging to a legal partnership or community between the surviving spouse and the heirs of the deceased one; but the District Court has concurrent jurisdiction in such a case. *Id.*

35. Judgment of the inferior Court affirmed by consent, damages being waived. *Weems v. Boyle et al.*, 17 L. R. 237.

36. It may be shown by affidavit in this Court that the matter in dispute exceeds 300 dollars and gives jurisdiction. *Perkins v. Nettles's administrator*, 17 L. R. 253.

37. Courts of general jurisdiction cannot sustain an action to establish a will, and decree its execution; and also the recovery under it. *Robert, f. w. c. v. Allier's agent*, 17 L. R. 4.

38. Whenever the validity of a will is attacked and put at issue at the time that its execution is applied for; or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into the possession of the estate under it *Courts of Probate alone have jurisdiction.* *Id.*

39. In an action by an heir at law against the testamentary heir or universal legatee, who is in possession, and sets up the will as his title to the property, the District Courts, or Courts of general juris-

diction are the proper tribunals in which such suits must be brought. *Robert, f. w. c. v. Allier's agent*, 17 L. R. 4.

40. It is no bar to a suit in one of the State Courts of Louisiana, or cause to deprive it of its jurisdiction, that a suit may have been commenced in another State or country between the same parties for the same cause of action. It would be otherwise if brought before two tribunals of concurrent jurisdiction within the State. *Peyroux et al. v. Davis*, 17 L. R. 479.

41. Every Court has jurisdiction to compel obedience to its orders. *Monbouchet's curator v. Ferraud fils*, 18 L. R. 372.

42. On the suggestion of the death of the plaintiff, during the pendency of the suit, in a Court of *ordinary and general jurisdiction*, it has no power to appoint a *curator* to represent his heirs. *Mc Manus v. West : Odom intervenor*, 18 L. R. 41.

43. A married woman may sue her tutor, in the Court of Probates, for the balance due her; and maintain the action with the assistance of her husband, on a note given in his name, as her agent, for a part of the sum coming to her. *Thibodeaux v. Thibodeaux*, 19 L. R. 439.

44. This Court will take jurisdiction of a suit for separation from bed and board, although the matter in contestation is not *appreciable in money* or does not consist in a money demand exceeding \$300. *Rowley v. Rowley*, 19 L. R. 557.

45. The law expressly gives the Courts jurisdiction in cases of separation from bed and board, and in actions of divorce; and this Court will not hesitate to act under it when they have not the slightest doubt of the constitutionality of the law. *Id.*

JURORS AND JURY.

1. When there is not a sufficient number of jurors, of the regular panel, in attendance, no matter from what cause, the Court is authorised to call on by standers. *Rondeau et al. v. New-Orleans Improvement and Banking Co.*, 15 L. R. 160.

2. It is not good cause of challenge, that a juror has been summoned as a witness by either party. Jurors may be sworn to give evidence to their fellow jurors. *Id.*

3. A question of fraud is the peculiar province of the jury, and their verdict will not be disturbed when generally supported by the evidence. *Lambeth & Thompson v. McMurray et al.*, 15 L. R. 466.

4. Judgments founded on the verdicts of juries, should never be brought before the Supreme Court without showing that an unsuccessful attempt has been made to obtain a new trial. *Id.*

5. The verdict of the jury, in two trials, on mere questions of

fact, where not clearly erroneous, will not be disturbed. *Bernard v. Pyburn*, 15 L. R. 126.

JURY.

1. The defendant to obtain a trial by jury when sued on his note or monied obligation, must swear to all the allegations in his plea or answer. *Amado v. Breda*, 16 L. R. 257.

2. It is essential to a special verdict that it finds the facts, but leaves the legal consequences to be drawn from such facts to the Court. *Campbell v. his creditors*, 16 L. R. 348.

3. But where the jury find certain facts true and draw their own conclusions from them in favor of the defendant, it is a general verdict of acquittal. *Id.*

4. Whatever respect may be entertained for the verdict of a jury the Court will disregard it, when the evidence is conclusive in opposition to it. *Melançon v. Robichaux*, 17 L. R. 97.

5. The verdict of the jury should always respond to the issues made by the pleadings and pass on the principal actions; and, unless special, it ought in cases of reconvention to pronounce upon the respective rights or actions of both parties. *Morgan v. Driggs et al.*, 17 L. R. 176.

6. The party dissatisfied with verdict of the jury is expressly allowed three days in which to move for a new trial; but he may waive this right by omitting to ask for a new trial: and having done so, he cannot ask that the judgment be amended or claim relief from the verdict in this Court, especially when he opposed the adverse party's attempt to obtain a new trial. *Nettles v. Scott*, 17 L. R. 336.

7. In actions of tort, in which from the nature of the demand, damages are to be assessed, a jury must be summoned to find the same. This Court alone cannot assess damages in such cases. *Olivier, curator, &c. v. Cannon*, 18 L. R. 474.

8. When an important fact which is submitted to a jury, is not positively proved, but only *inferred* from the evidence, their verdict is entitled to great weight, and will not be set aside unless manifestly erroneous. *Vaughan v. Western Marine and Fire Insurance Co.*, 19 L. R. 54.

9. The verdict of a jury in a case depending only on facts will not be disturbed, when not manifestly erroneous. *Nott & Co. v. Kirkman*, 19 L. R. 14.

10. The withdrawal of a juror from sickness, or other cause, produces at once a mistrial, and his place cannot be supplied but by consent. *Prentice v. Chewning*, 1 R. R. 71.

11. Where after the trial has commenced, a juror has been withdrawn, and a new one sworn by consent, either party, or the juror

himself, has a right to require that the witnesses shall be examined *de novo*. It will not be sufficient that the evidence which had been reduced to writing, be read to him. *Prentice v. Chewning*, 1 R. L. 71.

12. The Court may, *ex officio*, order a trial by jury, whenever, in its opinion, the case requires it. *Burke v. Brazeale and another*, 1 R. R. 73.

13. The assessment of damages is the peculiar province of a jury. When excessive, relief will be granted, but a strong case must be made out to justify the interference of the appellate Court. *Barney v. De Russy, sheriff, and others*, 1 R. R. 75.

14. A jury may be prayed for in a supplemental answer; but it will be in the discretion of the Court to permit such answers to be filed. It will be properly rejected where the jurors summoned for the term have been discharged, and allowing a jury would delay the trial a whole term. *Hooper v. Hyams, executor*, 1 R. R. 90.

15. The verdict of a jury will not be disturbed, where it does not appear that the judge, from whom a new trial was asked, erred in refusing it. *Mason v. Louisiana State Marine and Fire Insurance Company*, 1 R. R. 192.

16. The verdict of a jury on a question of fact, will not be disturbed unless clearly wrong. *Caldwell v. Cogswell and another* 1 R. R. 554.

17. The verdict of a jury will not be disturbed, unless manifestly erroneous. *De Blanc v. Martin*, 2 R. R. 82.

18. Motion for a new trial by plaintiff, in an action to annul a mortgage, on the ground that the clerk of the parish judge before whom the mortgage was executed, had entered into a conversation with five of the jurors while they were at dinner during a recess of the Court and before the argument had ended, and told them that if they annulled the mortgage their own mortgages, if they had any, would also be annulled. *Held*, that the motion was correctly overruled, there being no evidence that any fact was communicated which had not been sworn to on the trial, nor that any of the jury were interested in the question. *Id.*

19. Execution having been issued against defendant in an action on a note secured by mortgage, the proceedings were enjoined by a third person, the real owner of the mortgaged property, and the real debtor of the amount of the note; and a judgement was entered by consent, recognizing the property as belonging to the intervenor, and ordering its sale. The sale made in pursuance of this judgment having been set aside for irregularity, plaintiffs took a rule on intervenor to show cause why a *pluries fi. fa.* should not be issued. On an answer by the latter alleging the illegality of the judgment, and denying plaintiffs' right to proceed in the manner adopted by them, and praying for a trial by jury: *held*, that the rule presented no issue or question of fact for a trial by jury, and

that such trial was correctly refused. *Hobson v. Bein*, 2 R. R. 109.

20. The act of the 6th March, 1840, directing the mode of composing and drawing juries of District Courts, does not apply to the first judicial district, in which juries are not required to be drawn twenty days before each term of the Court. *Lyon v. Commercial Insurance Company*, 2 R. R. 266.

21. A formal writ of *venire facias* is not required by the laws of this State in any case. An order of Court for drawing and summoning jurors is sufficient. *Id.*

22. Since the act of 25th March, 1831, prescribing the qualifications of jurors, does not require that they should be house-keepers it may well be doubted whether that qualification, prescribed by art. 506 of the Code of Practice, is now necessary. *Id.*

23. One who resides in the parish, and pays a tax and house rent, is a *house-keeper* in the meaning of art. 506 of the Code of Practice. *Id.*

24. A prayer for a jury is too late after the case has been set for trial. C. P. 494, 495. *Menefee v. Johnson*, 2 R. R. 274.

25. The verdict of a jury will be set aside when contrary to the evidence. *Boullemet v. Philips*, 2 R. R. 365.

26. The verdict of the jury must always be understood with reference to the pleadings, and as responsive to the issues made by them. *Downes v. Scott*, 3 R. R. 84.

27. The verdict of a jury will not be disturbed, unless clearly wrong. *McCoy v. Hunter*, 3 R. R. 118; *Hughes v. Lee*, 3 R. R. 429.

28. The trial of an injunction is a summary proceeding in which neither party is entitled to a jury. *Dabbs v. Hemken*, 3 R. R. 123.

29. Jurors are so far the judges of the law as well as of the facts, that they have a right in all cases to find a general verdict. But the Court, if not satisfied therewith, may grant a new trial. *Thomas v. Turnley*, 3 R. R. 206.

30. To entitle a defendant to a trial by jury, under the 24th section of the act of 20th March, 1839, he must show, by his affidavit, that his means of defence are certain and unequivocal, and that they will affect the plaintiff's right to recover. *Smith v. Scott*, 3 R. R. 258.

31. A prayer for a trial by jury, by one of two or more debtors bound *in solido*, will not enure to the benefit of those who have not joined therein. *Mulhollan v. Henderson*, 3 R. R. 297.

32. Objections to a verdict lose much of their weight when not made before the Court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict should only be taken after the refusal of a new trial. *Hughes v. Lee*, 3 R. R. 429.

LAND-LAWS AND TITLES.

1. The Court will look beyond the confirmation of a claim by the land commissioners or Congress, emanating from the former Governments of Louisiana, in order to ascertain the extent and boundaries of the land claimed. *Millaudon et al. v. McDonough*, 18 L. R. 102.

2. When the expression in a grant or title only conveys a certain front and depth, the grantee or purchaser cannot claim by diverging lines to the rear and thereby obtain more than the superficies contained in a parallelogram. *Id.*

LANDS AND LAND-LAWS.

1. Delivery of the original is not of the essence of a grant, patent or commission, although the delivery of the thing granted is essential to the validity of the grant. *Lavergne's heirs v. Elkin's heirs*, 17 L. R. 220.

2. If it appears the original grant was never delivered, a copy of the record of it may be given in evidence. *Id.*

3. A grant which was complete under the French or Spanish Governments of Louisiana, required no confirmation to give it validity under ours. *Id.*

4. So a Spanish grant made to the ancestor of the plaintiffs in 1771, of land, found only in the book of grants, deposited in the land-office, is held to be sufficient evidence of title. *Id.*

5. Possession by the Government of the United States of a tract of land, cannot avail the party on his plea of prescription, when there is evidence that the title was in the plaintiffs before the treaty of cession. *Id.*

6. Admitting the plaintiffs are owners of the upper end of a larger tract of land, yet if they show no location by an authorised survey embracing *the locus in quo*, they cannot maintain an action even of trespass against a possessor so as to oust or disturb him. *Hornsby's heirs v. McDermott*, 19 L. R. 304.

7. The certificate of purchase from the register and receiver is not final evidence of title out of Government, when it is shown the entry and purchase were improperly allowed; although generally such certificates are considered as sufficient evidence of a sale from the Government as to form the basis of a petitory action. *Guidry v. Woods*, 19 L. R. 334.

8. The register and receiver are to decide on the fact whether the applicant for a pre-emption is in possession and has cultivated the land within the previous year; but if they undertake to grant a pre-emption to land, which the law declares shall not be granted,

they are acting on a subject matter clearly not within their jurisdiction. *Guidry v. Woods*, 19 L. R. 334.

9. The commissioner of the general land-office under the supervision of the secretary of the treasury, has the power to declare what lands, according to law, are liable to entry or location by pre-emption rights or floats; and may cancel the certificate of the register and receiver in this respect. *Id.*

10. The evidence and deposition of the land commissioner, of cancelling the register and receiver's certificate of land, not liable by law to be sold or entered as pre-emption rights or floats, is admissible in proof of these facts. *Id.*

11. Fractional townships fronting on water courses are surveyed in small tracts or lots of about 160 acres each, and numbered, but the lot or fractional section numbered 16, is not designated by law as school lands. It is only under the general laws, and where the township is surveyed in square sections that every 16th section is reserved as school land. *Barton's executrix v. Hemkin*, 19 L. R. 510.

12. In fractional or irregular townships on water courses the secretary of the treasury is required by law to select and designate the school lands. *Id.*

13. The chief clerk in the general land-office, being designated by law to act as commissioner in case of vacancy, &c., he is therefore an officier known to the law, to be recognized as such and presumed to be acting in accordance with law. *Id.*

14. The commissioner of the general land-office may at least, suspend if not annul titles granted by the register and receiver, until Congress or the Courts can act. *Id.*

15. Registers and receivers are to decide on the facts and sufficiency of proof in cases of pre-emption, when no fraud exists; but if they sell land exempted from sale by law, their acts are void for want of authority. *Id.*

16. The mere statement of the commissioner of the general land-office that he has cancelled a certificate of purchase given by the register, &c., is not an eviction which should rescind a sale between third parties. *Id.*

17. It is essential to the validity of an entry that the land intended to be appropriated, should be so described as to give notice of the appropriation to subsequent locators. *Patin v. Blaize Jr.*, 19 L. R. 396.

LAND TITLES.

1. The plaintiff claims a back concession of forty arpents, under a Spanish grant made in 1796, which runs into the defendant's tract fronting on bayou Lafourche, and which was set off by the

King's surveyor in metes and bounds, to certain settlers or colonists, without any regular grant in 1779 : *held*, that this title is superior, and will hold the land against the Spanish grant of subsequent date. *Landry v. Martin et al.*, 15 L. R. 1.

2. The Spanish government recognizes verbal, as well as written grants to land ; and a verbal grant, set off by the King's surveyor, passes all the right of the King to the domain, which cannot be subsequently granted by any of his Governors. *Id.*

3. After long and continued possession of land for nearly half a century, if a written title was necessary the testimony of witnesses, after the loss of the archives and titles, will authorize the Court to presume it. *Id.*

4. Under the Spanish laws, a title to immoveable property may be shown by parole evidence. *Landry v. Martin et al.*, 15 L. R. 10.

LAND TITLE LAWS.

1. The act of Congress of the 20th May, 1820, grants the right of pre-emption to front proprietors, to purchase an equal quantity of land in their rear, and adjacent to their front tract, not exceeding the same, and extending not more than forty arpents in depth ; provided, notice is given and payment made in two years ; otherwise, the right of pre-emption shall cease and become void. *Jourdan et al. v. Barrett et al.*, 13 L. R. 24.

2. Where back concessions or rear lands are claimed by several adjacent front proprietors, situated in the bend of a river, the surveyor general is to divide and apportion them in the most equitable manner, among such front proprietors as avail themselves of their privilege under this act, when by the converging of the side lines, there is not the full quantity for all the claimants. *Id.*

3. But where only one front proprietor claims the privilege under the act of Congress, to enter his back lands in a bend of the river by converging lines, he is entitled to his full quantity, and the surveyor general is bound to lay it off to him. This right was contingent, and the quantity liable to be reduced, so long as the act was in force, but it became absolute, and vested on the expiration of the act, which could not be affected by a revival of the law subsequently ; nor by the operations of the surveyor general. *Id.*

4. Such front proprietors as neglected or failed to enter their back concessions, before the expiration of the act, forfeited their right, and when the law was afterwards revived, it did not revive their right, to the prejudice of the only purchaser who had availed himself of the privilege. *Id.*

5. The decision of the secretary of the treasury, approving the operations of the surveyor general, in making the apportionments

among different claimants, is not conclusive upon the legal rights of the parties in a Court of justice. The authority of the surveyor general to make this apportionment, is confined to cases of conflict between *different claimants under the same act*. *Jourdan et al., v. Barrett et al.*, 13 L. R. 24.

6. Where certain lots or tracts of land have been located, surveyed and patented, the surveyor general cannot make a subsequent location of another claim, so as to interfere with, or affect the location of the original survey made by his predecessor, under which the land in dispute was sold and patented. *Slack v. Orillion*, 13 L. R. 56.

7. A special act of Congress, granting a tract of land within certain defined and precise boundaries, is equivalent to a patent, and will hold the land against any previous claim, not located or fixed by precise boundaries. *Id.*

8. The act of Congress passed the 15th June, 1832, giving to front proprietors on water courses, the preference of entering their back lands, provides that notices of such pre-emption claims shall be entered, and the money paid thereon, at least three weeks before the public sale of the lands in the township, by the proclamation of the President; and all lands not so entered, shall be liable to be sold, or afterwards entered as other public lands. The act of the 24th February, 1835, revives this act for one year. *Thompson v. Schlater*, 13 L. R. 115.

9. So, where A. enters back lands on the 18th December, 1833, after the township had been offered at public sale by the President, and B., who owned the front tract, entered the same land, as a back concession, in 1836, under the pre-emption law of 1835: *held*, that the entry and purchase of A., divested the government of its title, and B. lost his right of pre-emption, which ceased to exist after the land had been offered at public sale. *Id.*

10. The rights acquired by a purchaser of public lands, according to the provisions of the pre-emption law, act of 1832, *are vested*, and cannot be taken from him by a subsequent act in 1835, reviving the former law one year. *Id.*

11. Where the grantee of a tract of land, supposed to contain seventeen arpents, fronting on the Mississippi, sells the lower twelve arpents to two purchasers (six arpents each), with certain fixed boundaries, these will control the quantity, in case of deficiency in the whole tract. *Blanc v. Duplessis, f. m. c.*, 13 L. R. 334.

LAND TITLES AND LAWS.

1. Titles to land must be located according to their calls; and where part of the place called for by the title is abandoned and an

other person locates it and acquires a better title; the party abandoning cannot make his location in an other place to the prejudice of others. He must suffer the loss. *Wilcoxon v. Rogers et ux.*, 16 L. R. 6.

2. Where two confirmations of land titles are of equal dignity and one is regularly located and accompanied by possession, and no steps taken by the other, the first will hold the land by the prescription of ten years. *Id.*

3. A corporeal possession in the beginning, a civil one will be sufficient to complete the possession, already begun, and to support the prescription of ten years. *Id.*

4. Where the plaintiff holds by two titles and the premises are sold by the sheriff under execution against him, and he receives the balance after satisfying the judgment, he cannot set up a claim to the same property under the other title, not recited in the sheriff's deed although the sheriff describes the sale to be of the youngest of the two titles. *Collins v. Moore & Prescott*, 16 L. R. 75.

5. Where the purchaser of public lands offers to comply with the conditions of the law, and is prevented by the Government, not performing the obligations imposed on it, he is not to suffer or lose his rights on this account. *Marsh & Miller v. Gonsoulin*, 16 L. R. 84.

6. So, where the Government refused to receive the money from a pre-emptor, who had proved up his settlement right under the act of Congress passed the 29th May, 1830, because the land was not surveyed and a plat returned to the land office, and in the meantime the front proprietors entered and paid the Government for the same land under the act of 15th June, 1832, giving the owner of land fronting on water courses, a preference in becoming the purchaser of any vacant land back of his own tract: *held*, that the pre-emptor having complied with all the conditions of the law on his part, is entitled to hold the land. *Id.*

7. Where the evidence shows that the ancestor of the plaintiffs had sold and transferred his interest in a settlement right or tract of land, five years before its confirmation, although confirmed in his name, it enures to the benefit of the transferee and the heirs of the original grantee cannot recover it. *O'Brien's heirs v. Smith*, 16 L. R. 94.

8. The act of Congress passed 29th May, 1830, gives every settler or occupant of the public land a pre-emption right to purchase a quarter section of land at the minimum price, but forbids *all assignments* and transfers of pre-emption rights prior to issuing patents thereof, under the penalty of nullity. *Strong v. Rachal et al.*, 16 L. R. 232.

9. The act of 1832, which authorizes persons who have purchased their *pre-emption* rights to transfer their certificates and receipts to the land officers, and the issuing of patents to the assignees, does

not repeal that part of the act of May 29th, 1830, which declares all transfers of the right of pre-emption, null and void. *Strong v. Rachal et al.*, 16 L. R. 232.

10. So, the sale and mortgage of a pre-emption right to a quarter section of land, before a receipt and certificate is obtained from the land officer, under the act of Congress of the 26th May, 1830, is null and void. *Id.*

11. The penalty for failing to pay the different instalments to the United States for the purchase and entry of lands under the credit system, was absolute forfeiture, and the reversion of the land to the government. *Kirkby's heirs v. Fogleman*, 16 L. R. 277.

12. According to the act of Congress passed the 2d March, 1821, after the change of the *credit* to the *cash* system, which extended the credit on lands already purchased but not paid for, or allowed a discount to those preferring to pay in cash, the penalty for failing to comply with these requisitions was absolute forfeiture and reversion to the government. *Id.*

13. The entry and purchase of lands under the act of the 4th July, 1827, previously forfeited, divested the United States of all title which had been acquired by the previous forfeitures and reversions. *Id.*

14. The registers and receivers being authorised by the laws of Congress to carry into effect various laws allowing pre-emption rights, and also to make sale of the public lands, this Court is bound to give effect to the title they confer, unless the adverse party produces a better. *Id.*

15. So, where the register and receiver's certificate gave a pre-emption right to the plaintiff's ancestor *as assignee*, on paying the price to government, and there is no evidence of the assignment but this certificate: *held*, that they must recover the land, as against the defendant who claims under a prior entry, but his title was forfeited to the United States. *Id.*

LAWS.

1. The Civil Code of 1808, is a digest of the Civil Laws which were in force in Louisiana; and the re-enactment of them did not repeal the exceptions which limited their operation under the Spanish jurisprudence. *Verret et al. v. Theriot*, 15 L. R. 106.

2. So, the provision in art. 227 page 258, of the old Code, that the surviving husband or wife who marries again, is forbidden to dispose of the property inherited from any of the deceased children of the first marriage, it being *reserved* to the children of that marriage, is taken from the 15th law of Toro. *Id.*

3. The Spanish laws make an exception, that the surviving spouse, on marrying again, is not bound to *reserve* property of his deceased child of the first marriage for the other children of that

marriage, when it has been *acquired otherwise* than by inheritance from the deceased parent. It becomes the absolute property of the survivor, if it has been *purchased* by the deceased child, from the moment of his death. *Verret et al. v. Theriot*, 15 L. R. 106.

4. All statutes or laws, *in pari materia*, ought to be construed together in order to arrive at and ascertain the true meaning of the legislator. *Rouanet v. Hunt, tutor, etc.*, 17 L. R. 407.

5. Courts are bound to take notice of the date of laws, although there is no evidence adduced of their promulgation. *Stinson, curator, &c., v. Buisson*, 17 L. R. 567.

6. Remedial statutes or laws have no extra-territorial effect or operation. *Briggs, Lacoste & Co. v. Campbell*, 19 L. R. 524.

7. The interpretation of contracts depends upon the foreign law; but the remedies by which the obligation resulting from contracts are sought to be enforced, must be according to the forms and law of the place where the remedy is sought. *Id.*

8. The last article 3521, of the Louisiana Code, which repeals all laws in every case provided for in the Code, itself, applies not in every particular instance or cause, but to every *category* or class of cases, or *subject matter* upon which the Code contains express provisions, and abrogates all previous laws on these subjects. *Waters v. Patrovic & Blanchard*, 19 L. R. 584.

9. This Court has held (*in 5th Louisiana Report, page 493*), that part of the act of 1808, relative to proceedings upon prison bonds was still in force, notwithstanding the repealing act of 1828, and the Code of Practice. *Id.*

LEASE.

1. A contract of lease, either verbally or in writing, made by one partner, is binding on the partnership when it appears the firm occupied the leased premises, and in which the affairs of the partnership was conducted. *Reynolds v. Swain et al.*, 13 L. R. 193.

2. Where a tenant abandons the leased premises before the expiration of the lease, he *is at once* bound for the rent of the *whole term* and may be sued. *Id.*

3. The principles settled in the case of *Christy v. Casanave*, 2 Martin N. S. 451, making tenants who abandon their lease liable at once for the whole rent, are still in *force*, notwithstanding the repeal of all the Civil Laws not found in the Louisiana Code. *Id.*

4. Where a contract of lease stipulates that the lessee shall pay all the State, Parish and City taxes, and keep the side-walks in repair, it cannot be construed to extend to the payment of the expenses of paving the street in front of the leased premises. *Municipality No. 2 v. Curell*, 13 L. R. 318.

5. When the city ordinances provide that the owner shall be

taxed for the exclusive purpose of paving the streets and making the side-walks in front of their property, the lessee cannot be required to pay this expense, unless he expressly binds himself to do so in his contract of lease. *Municipality No. 2 v. Curell*, L. R. 318.

6. Where lessors received rent at a higher rate, after the annulment of the lease, they cannot be made to refund the difference, when it is not shown that the lessees did not consent to pay the higher rate of rent by a new lease. *Hyde et al. v. Goodrich*, 14 L. R. 439.

7. Interest cannot be recovered for rent arrear, from the time it became payable; but only from judicial demand. *Perret et ux. v. Dupré et al.*, 19 L. R. 341.

8. So a party is not bound to repair the leased premises when it can only be done by erecting new buildings. The adverse party may annul or put an end to the lease. *Id.*

9. When a landlord, instead of resorting to the means provided by law for obtaining payment of his rent and possession of his premises, takes upon himself, without authority, to remove the property, and to turn out the family of his tenant, he will be liable in damages; and it will be no excuse, that such removal was affected without violence or injury. *Thayer v. Littlejohn and others*, 1 R. R. 140.

10. The production of a receipt for a part of the rent, in a sufficient corroborating circumstance to establish a verbal lease for any amount, previously proved by the testimony of one witness. *Brandagee v. Fernandez and another*, 1 R. R. 260.

11. The right of the lessor over the products of the estate, or the moveables on the place leased, is of a higher nature than mere privilege. The latter is enforced only on the price of the moveables to which it applies; it does not enable the creditor to take, or to keep the effects themselves. The lessor, on the contrary, has a right of pledge on them; and may seize and retain them, until he is paid. *Garretson v. his creditors*, 1 R. R. 445.

12. The privilege of the lessor on the products of the estate, or on the moveables on the place leased, has a preference over all other privileged debts, such as expenses of the last illness, law charges, and others having a general privilege on the moveables. The charges for selling the moveables subject to the lessor's privilege, must be paid before the rent, as they are necessary to procure the means of paying it; and so of the funeral expenses for the debtor and his family, where there is no other source from which they can be paid. *Id.*

13. Builders who contract with tenants for alterations or repairs of the premises leased, have no lieu or privilege on the premises. There is no privity between the builder and owner. *Sewall v. Duplessis*, 2 R. R. 66.

14. Art. 2697 of the Civil Code, which provides that a lessee may remove the improvements and additions he has made to the

thing let, provided he leave it in the state in which he received it, cannot be extended by implication to builders who contract with such lessees. Such contractors must be considered as having done the work on the personal credit of the lessee; and they have no right to remove the materials used in such repairs and improvements, on the ground that they have not been paid for. *Sewall v. Duplessis*, 2 R. R. 66.

15. Art. 91 and 156 of the Code of Practice which provide, that if, in order to give jurisdiction to the Court, one demand less than is really due, and do not amend his petition and augment the demand, he shall be presumed to have remitted the surplus, relate to the reduction of an entire sum, as where the claim exceeds the jurisdiction of the Court and is reduced so as to bring it within it. But where an amount is payable in instalments, as rent at fixed periods, a conjunctive obligation is created, and each instalment may be paid or enforced separately. So, where four monthly instalments of rent are due, a suit for the amount due for the last month, will not release the lessee from the obligation to pay the rent due for preceeding months. *Brandagee v. Chamberlin*, 2 R. R. 207.

16. Under the act of 10th March, 1838, section 4, the Presiding judge of the City Court of New-Orleans has, within the city, exclusively of justices of the peace, or of the associate justices of that Court, original jurisdiction of all actions, for whatever amount, by landlords against their tenants for the possession of real property. *Kennedy v. Downey*, 2 R. R. 284.

17. Art. 2683 of the Civil Code, authorizes justices of the peace, out of the city of New-Orleans, to order the expulsion of tenants, whatever may be the value of the lease. *Id.*

18. The privilege of the lessor on the moveables found in the house, yields only to that of the funeral expenses of the debtor and his family, and to that only where there is no other source from which it can be paid. The charges for selling the moveables, which, under art. 3223 of the Civil Code, are to be paid before the rent, are those only which are necessary or incidental to the sale of the moveables. *Montilly v. his creditors*, 2 R. R. 350.

19. A tenant cannot dispute the title of his lessor, nor change his possession by setting up other titles. The possession of the lessee is that of the lessor. *Le Breton v. McDonough*, 2 R. R. 461.

20. A lessor is bound to keep the premises in a condition fit for the purposes for which they were leased. If he fail to make the repairs necessary during the lease, the tenant may make them himself, and deduct the amount from the rent. *Perrett v. Dupré*, 3 R. R. 52.

21. The lessor is bound to indemnify the lessee, for all the damage sustained by the latter in consequence of the vices and defects of the thing leased, though the lessor knew nothing of the existence of

such vices and defects at the time of the lease, and even where they have arisen since. *Perret v. Dupré*, 3 R. R. 52.

22. Where after the commencement of a lease the house becomes so much injured as to be incapable of being rendered fit for the purposes for which it was leased, otherwise than by rebuilding it, and the lessor offers to dissolve the lease, which the lessee refuses, and continues to occupy the building: *held*, that the lessor will not be responsible for any damage subsequently sustained by the lessee in consequence of the condition of the building, and that the latter will not be entitled to claim any diminution of the rent for the period he continued to occupy the premises after the offer of the lessor to annul the lease. *Id.*

23. In an action for the rent of a building occupied as a shop by a commercial partnership, the judgment must be against the lessees *in solido*. *Id.*

LEGACIES AND LEGATEES.

1. It is necessary to enable a legatee to take, under our laws, that he be in *existence* at the time of opening the estate and have capacity to receive, if the legacy be absolute; but if it is conditional, it is sufficient if the capacity to receive exist at the time of the fulfilment of the condition. *Milne's heirs v. Milne's executors*, 17 L. R. 46.

2. Where legacies were given by the late Julian Poydras to the parishes of *Point Coupée* and *West Baton Rouge* for particular specified objects, the legacies were absolute; but there was no capacity in the legatees to take at the moment of opening the succession; and laws were passed authorising the police juries of those parishes to accept the legacies for the objects named. *Id.*

3. So, where legacies were left to two asylums for destitute orphan boys and destitute orphan girls, with directions to the executors to cause the same to be duly incorporated. *Held*, that these dispositions were conditional, and as soon as the condition was fulfilled by incorporating those asylums the capacity to take legacies was then created. *Id.*

4. The direction of the testator to hand over the legacies where the asylums are incorporated, is not in violation of the provisions of the Code which declares that substitutions are abolished. *Id.*

5. The object in abolishing substitutions, &c., was to prevent property from being tied up in the hands of individuals, and placed out of commerce; but it was never contemplated to abolish naked trusts which were to be executed immediately. *Id.*

6. A particular legacy is to be discharged in preference to all others out of the funds of the succession; and in default of funds it is to be paid, as long as the estate is administered by execu-

tors, indifferently out of the personal and real estate, and becomes a charge on the whole estate; and descends to the heir as a personal debt when he takes possession. Interest is due thereon. *Duke of Richmond et al. v. Milne's executors*, 17 L. R. 312.

7. A particular legacy *here*, by the law of Scotland would be considered as a *pure bequest* of a sum of money and not of heritable property, which if made by a person in Scotland to a citizen of Louisiana, the Courts of law in that country will give effect to the legacy. *Id.*

8. So, where, as in this case, a particular legacy of \$100,000 is bequeathed by a citizen of Louisiana, to establish a free school in his native town of Fochabers, in Scotland, it being purely moveable in its nature, and independant in any manner of heritable property, must consequently be paid out of the estate without reference to any particular real estate. *Id.*

9. Interest on a particular legacy is due from the day of demand of its delivery, arising *ex morâ*, and depending on the lapse of time the legatee is deprived of the use of it; being a legal consequence of the debt or obligation; and may be allowed without being specially claimed in the petition. *Duke of Richmond et al., v. Milne's executor*, 17 L. R. 328.

10. Interest is due on a legacy for a specific sum of money from judicial demand, and follows as a legal consequence of the debt or principal obligation. *Id.*

LEGATEE.

1. It is only from the forced heirs that a universal legatee is bound to demand the delivery of the property bequeathed to him; and if there be no such forced heirs, he is seized of right of the estate, and no demand is required. *Fowler et al. v. Boyd*, 15 L. R. 562.

2. So, the universal legatee under a will and a universal donee under a marriage contract, are by mere operation of law seized of of the whole estate, and no demand whatever is necessary from the heirs at law. *Id.*

LESION.

1. In an action of lesion beyond moiety, it is not necessary to put the defendant *in morâ*, more than by the institution of suit; the sole object of which, is to compel the vendee to restore the property to the vendor. *Copley v. Flint & Cox*, 16 L. R. 380.

2. A sale and purchase of a tract of land, for the purpose of re-

demption by the original owner, and the extinguishment of a doubtful claim, growing out of a forced alienation for taxes, is not such a sale as would give rise to an action of rescission for lesion. *Copley v. Flint & Cox*, 16 L. R. 380.

3. The intrinsic value of the land at the time of sale, and of the plaintiff's pretensions and the nature of his title, should be examined and inquired into, as matters put expressly at issue in an action for a rescission of a sale on account of lesion. *Id.*

4. But in a sale of a precarious claim to land without warranty, it is a proper subject of inquiry, what were the vendor's pretensions worth; rather than what was the intrinsic value of the land in an action of lesion. *Id.*

5. Under the plea of general issue, in an action for the rescission of a sale for lesion beyond moiety, evidence is admissible to show what the plaintiff's pretensions, title or claim, was really worth without being confined to the mere intrinsic value of the land. *Id.*

LESSOR AND LESSEE.

1. Builders who contract with tenants for the repairs and alteration of the leased premises, and have their contract recorded, have no lien or privilege on the property under lease. There is no privity between the builder and owner of the leased property; and the mere consent given in the lease to make the alterations on the premises, renders the lessor in no way liable to the builder. *Hoffman v. Laurans et al.*, 18 L. R. 70.

2. The lessor is not bound to pay for improvements or alterations made on the leased premises by the tenant, when they are not advantageous to him. *Id.*

3. In an action of damages for the non compliance of the lessor with his contract of lease, the plaintiff must prove that he put the defendant *in default* in one of the modes pointed out by article 1905 of the Louisiana Code, before he can recover. *Taylor v. Chase*, 18 L. R. 88.

4. When the lessor takes possession of the leased premises in an unfinished state, and he does not at the time notify the lessor, that he would be held responsible for the delay in finishing them, he cannot recover damages sustained by their non-completion. *Id.*

5. The fact of the lessee taking possession of the leased premises does not entitle him to damages sustained by their unfinished state; as it does not amount to a putting in default according to law. *Id.*

6. There is no difference between a dwelling house and stores in relation to the rights of the lessor on the effects of the lessee and *under lessee*; and persons who pay storage on their goods in a whare house, are liable to the landlord's privilege *as sub lessees*. *Vairin & Co. v. Hunt et al.*, 18 L. R. 498.

7. But the goods or effects of the sub-lessees or persons storing property in a ware-house, are liable to the proprietor's right of pledge or privilege *only* for so much as *they may be owing at the time this right is enforced.* *Vairin & Co. v. Hunt et al.*, 18 L. R. 498.

LETTING AND HIRING.

1. The contract of letting and hiring, must be construed and modified by the use and general understanding of the parties in the country where it is made; as a slave hired for an ostler in a country inn, may be used to drive a waggon to haul provisions and fuel for the tavern. *Taylor v. Andrus*, 16 L. R. 15.

2. So, where a slave was hired as an ostler in a small town, and he was employed to drive a waggon and haul wood to the tavern, and was accidentally killed: *held*, that the owner or hirer cannot recover his value, as having been improperly used or employed. *Id.*

LEVEES.

1. It is not necessary to show a police regulation to compel a front proprietor to make his levee, on a bayou communicating with the river. Under the law of 1829 all riparian owners are bound to keep up levees on their fronts; and in neglecting to do so, are liable for all damages, and losses, agreeably to articles 2234, 2235 of the Louisiana Code. *Barrataria and Lafourche Canal Co. v. Field et al.*, 17 L. R. 421.

LEVEES AND STREETS.

1. The decision of a jury of twelve inhabitants, or land holders, under the act of 15th February, 1808, respecting the police of the shores of rivers, directing the construction of *a levee* for the protection of a faubourg, of certain dimensions, and fixing its location, is conclusive of the necessity and propriety of the measure, and the City Council have the power to cause the execution of the work. *Hanson et al. v. City Council of Lafayette*, 18 L. R. 295.

2. In a controversy about the location of a levee, parole evidence will be received to show *where* the whole levee stood, and the new one is proposed to be; and also that the adverse party was trespassing on *a public place*, administered for the public use. *Id.*

3. The use of the banks of navigable rivers, is a servitude for the public use or common utility; and every proprietor, adjacent to

the shores of of navigable rivers is bound to have sufficient space for levees, roads, streets, and other public or common works. *Hanson et al. v. City Council of Lafayette*, 18 L. R. 295.

4. The charter of the City of Lafayette, gives the City Council the entire control of the streets, levees, wharves, &c.; confers on the corporation the same powers granted to the City of New-Orleans, over these objects; and it is subrogated to the powers of the police jury of the Parish of Jefferson, within the limits of the City. *Id.*

5. No man or individual proprietor of the banks of a navigable river, can appropriate them exclusively to his own use, and at his pleasure to construct levees or erect buildings and works that will obstruct the free use of its banks *to all men*, although the right of property is in him as proprietor of the adjacent lands. *Id.*

6. A re-hearing allowed of the question of damages, respecting the right of plaintiffs, as front proprietors to be paid for the property taken or destroyed in making the new levee. *Hanson et al. v. City Council of Lafayette*, 18 L. R. 309.

LITIGIOUS RIGHT.

1. One against whom a litigious right has been purchased, may be released therefrom by paying the transferee the real price of the transfer, with interest from its date. *Winchester v. Cain and another*, 1 R. R. 421.

MALICIOUS PROSECUTION.

1. To maintain an action for a malicious prosecution, the plaintiff must prove: *first*, the prosecution; *second*, that the defendant was the prosecutor, or the cause of the prosecution; *third*, that he was actuated by malice; *fourth*, that there was no probable cause for the prosecution. *Grant v. Deuel*, 3 R. R. 17.

2. In an action for a malicious prosecution, malice may be established: *first*, by proving express malice; *second*, by showing want of probable cause for the prosecution. Malice is usually inferred from the want of probable cause. *Id.*

3. It is a well settled rule of law, founded on principles of policy and convenience, that the prosecutor shall be protected, though his private motives may have been malicious, provided he had probable cause for the charge. Where express malice has been proved, there must be some positive evidence to show that the prosecution was groundless, though slight evidence will be sufficient. *Id.*

4. An acquittal, or even subsequent proof of complete innocence,

is not sufficient evidence of want of probable cause. *Grant v. Deuel*, 3 R. R. 17.

5. Proof that the jury entertained doubt on the evidence, or deliberated as to the guilt of the accused after the case was concluded, is proof of probable cause. *Id.*

MANDAMUS.

1. If the judge of probates of the parish where the parties reside at the time, *refuse*, on the application of the tutrix to appoint an under-tutor to the minor children, and order a family meeting to relieve her property from a general mortgage, on giving a special one, a peremptory *mandamus* will be awarded requiring him to proceed. *State of Louisiana v. Judge Bermudez*, 14 L. R. 478.

2. It is the duty of the judge of the parish where the minor has his domicil, to appoint an under-tutor as soon as a vacancy occurs. *Id.*

3. A *mandamus* will not be allowed to compel the judge of an inferior Court to proceed in the trial of a cause forthwith, in which he has granted a continuance. *State of Louisiana v. Judge of the Parish Court*, 15 L. R. 521.

4. No appeal lies from the continuance of a cause when there has been no final judgment. *Id.*

5. Where part of the directors of a Bank exclude one of their number from the privilege of examining the discount book, to which all the rest have access, on the ground that he is hostile to the institution, and will use the formation he may obtain to its injury, a *mandamus* will lie to enforce the right, which is essential to the discharge of his duties as a director. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

6. To obtain a *mandamus* the applicant must allege and prove the duty required to be performed, and that he has been injured, or apprehends injury, or that he has been deprived of some legal right. *Id.*

7. Under the Code of Practice the powers of the Courts of this State as to issuing writs of *mandamus*, are more extensive than those of the tribunals governed by the common law. *Id.*

8. Under art. 831 of the Code of Practice, a *mandamus* may be issued where the party has other means of relief, if the slowness of the ordinary legal forms is likely to produce great delay and defeat the ends of justice, as well as in cases where there is no other specific remedy. *Id.*

9. The books of a corporation are evidence of the acts of proceedings of the body, and, with respects to the corporators, are public. They are common evidence and each individual having a legal interest in them, has a right to inspect, and to use them as

evidence of his rights. But a *mandamus* will not be issued to compel the keeper of such books to allow an inspection, or the taking of copies, unless a clear right be shown, and some just or useful purpose is to be affected. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

MANDATORIES.

1. Directors are not officers of a bank, in the proper sense of the word; nor have they *individually* any power or control in its management. They act collectively, and at stated times; and they are not mandatories, or agents of the bank. *Louisiana State Bank v. Senecal*, 13 L. R. 525.

2. So, where a note was discounted at the instance of one of the directors, who knew, but failed to disclose a condition on which it was given, to wit, that it should not be negotiated, nor payment exacted until certain mortgages were released: *held*, that the bank is not to be considered as cognizant of the condition, and is entitled to recover notwithstanding it. *Id.*

MARITAL PORTION.

1. The action given to the surviving wife, to claim her marital portion when she is in necessitous circumstances, pre-supposes a liquidation and final settlement of the succession of the husband; and also of the community lately existing between them. *Harrell v. Harrell et al.*, 17 L. R. 374.

2. It is only after the liquidation and settlement of the succession that the action for the marital portion, is open, which depends on two essential and relative facts; that the husband *died rich* and left his widow in necessitous circumstances. *Id.*

MEXICAN GULF RAIL-WAY.

1. The act of 12th March, 1838, authorising certain loans to be made to the Mexican Rail-way Company, and other companies, does not, of itself, create a mortgage on the property of those companies, nor could it without their consent. That consent is expressed by the acts of mortgage, executed in pursuance of it. The act contains only a proposition to loan, upon the execution of a mortgage on the property of the company; when accepted, the mortgage exists, and is essentially conventional. The act did not con-

template taking a general mortgage on all the property of the company, present and future. *State v. Mexican Gulf Rail-Way*, 3 R. R. 513.

MILITARY SITES.

1. The act of Congress of the 3d of March, 1819, authorising the sale of certain military sites, did not confer an authority personal to the secretary of war then in office; the power conferred was given to the department of war, to be exercised under the discretion of the President of the United States. Nor is it material whether the acts authorised by it were executed by the secretary himself or by some officer acting under his authority. *Culliver v. Berge and another*, 1 R. R. 427.

2. An exchange of a military site for another land, is valid as a sale, under the act of 3d of March, 1819, authorising the sale of certain military sites. An exchange is, in effect, but a double sale. *Id.*

MINOR.

1. The father or mother of a minor, or person in whose charge the minor is left are responsible for the injury he may do to another; but this responsibility is based on the ground that the person having control of him could have prevented the act and did not; and is responsible for neglect. *Cleveland v. Mayo et ux.* 19 L. R. 414.

2. But where a person, having control of a minor, causes or commands him to commit a crime, or an act causing damage and injury to another, such person is responsible as having committed the offence, although an irresponsible person has been interposed. *Id.*

3. Where a person has treated with a *minor*, he cannot plead the nullity of the agreement, when sought to be enforced after the disability has ceased. *Anderson's administrator v. Birdsall's administratrix*, 19 L. R. 441.

4. A compromise by a *tutrix* will not be binding on the minor, unless subsequently ratified by the latter. *Nantz v. Wyatt and others*, 1 R. R. 10.

5. It is the duty of an executor, when rendering his accounts, to disclose the name of the heir to the succession, and to require that he be cited through his tutor or under-tutor. *Bry, under-tutor v. Dowell, executor*, 1 R. R. 111.

6. On an opposition by the under-tutor of a minor heir to the

homologation of the account of an executor, who was also tutor to the minor, the latter cannot object to proof of his tutorship, when offered by the opponent, on the ground that such tutorship was not alleged in the opposition. So soon as his right to oppose the account was contested, the under-tutor was bound to show that there existed such an opposition of interest between the minor and his tutor, as made it his duty to appear on behalf of the former; and and this could not be done without showing that the executor was himself the tutor of the minor, to whom he was rendering an account. *Bry, under-tutor, v. Dowell, executor*, 1 R. R. 111.

7. Where an under-tutor, in behalf of a minor, opposes the homologation of the accounts of an executor, it will be presumed that the estate has been accepted according to law, otherwise the minor would be without any interest in the matter. *Id.*

8. The decree of a Court of Probate homologating the accounts of a tutor, rendered contradictorily with the under-tutor, is not conclusive against the minor, who has a certain time after majority within which to examine and contest them; and the Court can in no way discharge the tutor, while the law makes him responsible to his pupil. *Id.*

9. An executor is entitled to his discharge at the expiration of one year; his accounts cannot remain open, and his responsibility be continued for a number of years; and when they have been once settled by the Court of Probates, contradictorily with the heirs of age, or minors represented by their tutors or under-tutors, the decree will be as final and binding on such heirs as any judgment in an ordinary suit, to which they may have been parties. *Id.*

10. Where an executor is also tutor of the minor heir, his accountability to him as executor, should be finally determined before he enters upon his administration as tutor, which is to last until the majority of his ward. *Id.*

11. The tutrix of the minor heirs cannot administer a succession by virtue of her office as tutrix; she must be appointed administratrix, and give the security required by law. Payment to her of a debt due to the succession, would not protect the party making it, against the claim of the heirs of age, nor of the administrator, should one be afterwards appointed. *Tildon v. Dees, tutrix*, 1 R. R. 407.

12 The domicil of the tutor is that of the minor. The Court of Probates of the parish in which the minor has his domicil, is the proper tribunal to order a family meeting of the relations or friends, to determine questions affecting the interests of the minor. *State v. Judge of Court of Probates of New-Orleans*, 2 R. R. 160.

13. So long as a tutrix continues to act, her domicil is that of the minor. Where the legal tutor of a minor changes his domicil after the tutorship has devolved upon him, the new domicil of the tutor will become that of the minor, for all purposes connected with the administration of the estate, and for the appointment of a successor

in case of the tutor's death. *Aliter*, in France, where the tutor is dative. *State v. Judge of Court of Probates of New-Orleans*, 2 R. R. 418.

14. A minor not emancipated, who had lived abroad for fifteen years, but who was born in this State, where his tutrix resides, is domiciled here. A minor, not emancipated, can have no other domicil than that of his father, mother, or tutor. C. C. 48. *Succession of Robert*, 2 R. R. 427.

15. A domicil of choice can only be acquired by one who is *sui juris*.; consequently, it cannot be acquired by a minor. *Id.*

16. The consent of the tutor to the marriage abroad of an unemancipated minor, does not authorize the latter to change her domicil. Actual emancipation by marriage, could alone affect a change. Until the act or event which gives the minor the right to change his or her domicil has taken place, the domicil of the father, mother, or tutor, must be considered that of the unemancipated minor. *Id.*

17. By the laws of France the widow becomes the tutrix of her minor child immediately after the death of her husband, and needs no letters of tutorship to act as such; and, by the same laws, she is entitled to the enjoyment of all the property of her child, until he reach the age of eighteen, or be emancipated. *Succession of Senac*, 2 R. R. 258.

18. The office of under-tutor is always dative; and no law compels any one to accept such an appointment. *State v. Judge of Court of Probates of New-Orleans*, 2 R. R. 418.

19. The resignation of an under-tutor must be addressed to the Court of Probates of the parish in which the minor has his domicil; and it is the duty of the judge of that Court to accept the resignation when tendered, and to appoint his successor. *Id.*

20. The father and natural tutor having advanced the capital for a minor child not yet emancipated, constituted her, by notarial act, a partner in *commendam*. *Held*, that the authorization to enter into the partnership, having been given by notarial act was equivalent to an emancipation; that the father clearly intended to give her the necessary authorization to enter the partnership; and that whatever words may be used, effect will be given to the intention of the father, if expressed in an act clothed with the necessary solemnities. *Jonau v. Blanchard*, 2 R. R. 513.

21. An emancipated minor may engage in trade, and he will be bound by his commercial engagements as a person of full age. C. C. 379, 1867, 2222. He may form a general partnership, as well as one in *commendam*. *Id.*

22. The ratification by a husband of a contract of partnership entered into by his wife, an unemancipated minor, before marriage, will be binding on the latter, he being by law the administrator of her dower. C. C. 2327, 2329, 2330, 2334. *Id.*

23. The object of the special mortgage authorised to be execut-

ed by the act of the 11th March, 1830, relative to the tutors and curators of minors, is to secure the rights and property of the minor, and the faithful administration of the tutor until his final discharge. It is a substitute for the general legal mortgage, so far as the rights of the minor are concerned; and is special only as to the property subject to it. As soon as the special mortgage is accepted and recorded, the general mortgage resulting from the tutorship ceases to exist as to third persons, and the mass of the property will be released, though an error may have been committed in ascertaining the amount due to the minor at the time of executing the special mortgage, the latter is not restricted to the amount supposed to be due at the time it was given. The property specially mortgaged will be bound for whatever may be due from the tutor on the final settlement of his accounts. The amount found due to the minor by the Court of Probates during his minority, will not be conclusive upon him. The account may be opened on the final settlement of the tutorship. *Bernard v. Erwin*, 2 R. R. 407.

24. Where in order to pay the amount due to one who has attained his majority, it is necessary to sell property, specially mortgaged by a tutor under the act of 1830 to secure the rights of the minors, the property will be sold, to make the amount due to the former, subject to the mortgage in favor of the other minors. To sell the whole property for cash, and to pay over the amount due to those yet minors to their tutor, would be to defeat the very purpose of the mortgage. *Id.*

25. In an action against a third possessor of property, specially mortgaged by a tutor, under the act of 1830, to secure the rights of the minor and the faithful discharge of his duties as tutor, where the rights of the minor had been settled by a judgment of the Court of Probates, the plaintiff, the former minor, will be entitled to legal interest, on the amount so fixed, from the date of the judgment settling his claim. *Id.*

26. The legal mortgage declared by article 3283 of the Civil Code to exist, from the day of the first act of interference, on the property of one who, without having been appointed tutor or curator to a minor, an interdicted or absent person, interferes in the administration of the property, will not attach to the property of one who, having become the surety of a tutor on condition that he (*the surety*) should administer the property, received from the tutor, in pursuance of the agreement, money belonging to his wards, which he failed to pay over. The tutor having assented to the employment of the money by his surety, the latter cannot be considered as having interfered with the administration in the meaning of article 3283. *Succession of De Armas*, 2 R. R. 445.

27. The provisions of the Civil Code which establish mortgages in favor of minors, at least so far as they are tacit and exist without being recorded, are confined to persons who receive their appointments as tutors from our Courts, or who, after receiving such ap-

pointments abroad, come to reside here; and in the latter case such tacit mortgages exist only for sums received since their removal to this State. *Prats v. his creditors*, 2 R. R. 501.

MINORS.

1. According to the Spanish law, minors had a legal mortgage on the property of the *sureties* of their corator *ad bona*, which existed without being registered. But since the adoption of the Louisiana Code, this mortgage is not recognized in relation to the *sureties* of curators. *Roche's heirs v. Graysillière et al.*, 13 L. R. 238.

2. Where there is a formal decree of the Court of Probates, recognizing the necessity of selling property inherited by minors, for the payment of the debts of the succession, giving an opportunity to the attorney of absent heirs to show, that in fact no such necessity existed; the purchaser is not bound to look beyond this. *Lalanne's heirs v. Moreau*, 13 L. R. 431.

3. No alienation of minor's property can take place without the advice and consent of a family meeting, and upon sufficient cause shown. *Id.*

4. The property of a succession which descends to and is inherited by the minor children, cannot be adjudicated to the surviving widow and mother, for less than its *appraised value*. *Pipkin v. Doiron*, 14 L. R. 294.

5. A minor not emancipated, is not bound by mercantile contracts; nor by an engagement to enter into a partnership to carry on mercantile business. *Willet v. Tessier*, 15 L. R. 13.

6. Minors not emancipated are incapable, even with the authorization of their tutors, to make valid contracts in relation to business or mercantile transactions. *Id.*

7. No consent of the father or tutor of a minor can remove the disabilities of minority. If it could, it would amount to a verbal emancipation which is forbidden by law. *Id.*

8. Where the minor's rights against his tutor are secured by a special mortgage *regularly accepted* by a family meeting and *by the Court*, the purchaser is justified in concluding that the general mortgage in favor of the minor has ceased to exist. *Lesassier v. Dashiell*, 17 L. R. 194.

9. Third persons dealing with a tutor are bound to inquire how the minor's rights are secured; and the general mortgage resulting from the tutorship only ceased to exist with regard to third persons after the special mortgage has been accepted and recorded. *Id.*

10. The general rule is that purchasers under the faith of proceedings apparently sanctioned by the Probate Court, or a judgment cannot be affected by a suit of the minor seeking to annul those proceedings. *Id.*

11. Where the proceedings in the Court of Probates do not conform to all the provisions and formalities of the law required in giving special, in lieu of a general mortgage, the judgment rendered therein is not sufficient to protect purchasers against the minor's general mortgage. *Lesassier v. Dashiell*, 17 L. R. 194.

12. And where no experts were appointed no previous liquidation of the minor's rights had and the act of special mortgage not accepted by the judge or under-tutor, and never sanctioned by the Court of Probates, such proceedings will not authorize the purchaser from the tutor, to disregard the minor's general mortgage. *Id.*

13. Heirs of age can accept a succession simply, or do acts rendering themselves unconditionally liable. Minors are necessarily beneficiary heirs. *Porter v. Muggah*, 3 R. R. 29.

14. The fact that a party was a minor at the time that a judgment was rendered against him, and that his tutor did not attend to, or understand his rights, or take the necessary pains to procure the testimony to establish them, will not entitle him to relief, though it be proved that a different judgment must have been rendered had the proper testimony been produced in the first instance. The first judgment is *res judicata*. *Towles v. Conrad*, 3 R. R. 69.

15. The advice of a family meeting is not necessary to authorize the institution of a suit by a tutor to recover real estate belonging to his ward. *Beard v. Morancy*, 3 R. R. 119.

16. The decree of the Court of Probates when the succession is opened, made in conformity to the advice of a family meeting, is necessary to authorize the sale of property belonging to minor heirs; and where such a decree has been made, the Court will not look beyond it. *Id.*

17. Property of certain minor heirs having been sold by the Parish Judge, was afterwards seized under an execution by a creditor of the purchaser. The tutor of the heirs opposed the payment of the proceeds of the sale to the creditor, claiming a vendor's privilege for the price yet due, and setting up a mortgage given to secure the payment. In an action subsequently commenced by him, on behalf of the minors, against the syndic of the purchaser, to recover the land: *held*, that his opposition to the payment of the proceeds to the seizing creditor, could not preclude the minor heirs from claiming the land itself. *Id.*

18. The acknowledgment and payment by tutors of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, Courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the costs of the attendance of witnesses or of their depositions

would involve the estates in heavy and unnecessary expense. *Succession of Frantum*, 3 R. R. 283.

19. The relations of a minor, who under articles 290, 292 of the Civil Code, are bound to cause a tutor to be appointed to them, are authorised, and, perhaps, bound to oppose an appointment when illegally made. *Succession of Winn*, 3 R. R. 303.

20. The appointment of a tutor by a Court of Probates, can be set aside only by appeal, or by an action of nullity. Its legality cannot be inquired into collaterally. *Id.*

21. Where a mother, who had been confirmed as the natural tutrix of her minor children, marries a second husband, domiciliated in a different parish, though without having convened a family meeting to determine whether she shall be continued as tutrix, both herself and the minors will acquire immediately, by the very fact of the marriage, a domicil in the parish of the second husband. C. C. 48. *Id.*

22. In all cases concerning minors, the judge referred to is the judge of the parish within whose jurisdiction the minors reside, if residents of the State. Act 18th March, 1809, sect. 8. *Id.*

23. The appointment of a tutor or curator to a minor, belongs to the probate judge of the domicil or usual place of residence of the father or mother of such minor, if either be alive. C. P. 944. *Id.*

24. No legal tutor can be appointed to a minor, unless both the father and mother of the minor be dead. C. C. 281. *Tutorship of Mossy*, 3 R. R. 390.

25. Where a mother, the natural tutrix of her minor children, forfeits her tutorship by marrying a second time, without having previously convoked a family meeting to determine whether she shall continue as tutrix, and is re-appointed by the judge, under the advice of a family meeting, she will hold the appointment as a dative tutrix. C. P. 951. *Id.*

26. Where the proceedings in a contest, relative to the tutorship of a minor, have had no other object than to ascertain which of the parties was legally entitled to the appointment, neither having any personal interest in the matter, the costs will be ordered to be paid out of the estate of the minors. *Id.*

MONITION.

1. A monition has no other effect than to protect the purchaser against the claim of the defendant in execution; or that of any person resulting from any irregularity in the judgment or other proceedings in making the sale. *Cordeviolle & Lacroix v. Hosmer*, 16 L. R. 590.

MORTGAGE.

1. Under the Spanish laws as they existed in the State in 1824, a legal mortgage attached in favor of minors upon the property of the *sureties* of the curator *ad bona*. *Roche's heirs v. Goysillière*, 13 L. R. 238.

2. On the adoption of the Louisiana Code in 1825, mortgages, whether legal, conventional or judicial, are required to be recorded; and in order to preserve their evidence, the inscription of mortgages must be renewed before the expiration of ten years; otherwise their effect ceases after the expiration of that time; even against the contracting party. *Id.*

3. Mortgages to which husbands, tutors, and curators are subjected by law, are the only ones not requiring registry by the Code; but under the Spanish law there is no exception made with respect to the legal mortgage on the property of the *surety* of a curator. *Id.*

4. So, where more than ten years elapsed after the promulgation of the Louisiana Code, before minors asserted their claim against the *surety* of their curator *ad bona*, and without the re-inscription of their legal mortgage within that time: *held*, that the effect of the mortgage ceased, and it could no longer be enforced against the property on which it previously existed. *Id.*

5. The art. 3298, of the Louisiana Code, provides that a mortgage exists without being recorded in favor of minors, interdicted or absent persons, on the property of their tutors, curators and *others*, &c.; but this mortgage is limited by the Code, and does not extend to the property of the *sureties* of tutors, curators *ad bona*, &c. *Roche's heirs v. Groysillière*, 13 L. R. 247.

6. The purchaser of property sold under a *feri facias* subject to a previous mortgage, will be responsible only for the amount of such mortgage, and any surplus he may have bid above that amount. And where such previous mortgage is revoked so far as a third person is concerned, and his claim declared to have precedence on the proceeds of the mortgaged property, the amount due from the purchaser on account of the mortgage, will be first applied to the settlement of that claim, and the balance only, will belong to the holder of the mortgage. *Oliver and others v. Stevens, sheriff, and another*, 1 R. R. 86.

7. The endorsers of a note secured by mortgage, may, subsequently to the endorsement, execute an authentic act recognizing such endorsement, and an authentic subrogation of the mortgage to secure its payment. *Duncan v. Elam*, 1 R. R. 135.

8. Workmen, or others having a privilege on improvements erected on ground on which the vendor has a mortgage, cannot cause such improvements to be sold separately from the ground on which they stand; they must be sold together, in order that the highest price may be obtained, to be divided between the parties having a privilege on them, and any surplus, with the price of the land, to the vendor. *McDonough v. Le Roy*, 1 R. R. 173.

9. The right given by art. 686 of the Code of Practice, to a creditor having a privilege or special mortgage on property seized for a debt of which all the instalments are not due, of causing the whole property to be sold on terms of credit corresponding with the periods at which such instalments are payable, results from the principle that every part of the property is mortgaged for the whole of the debt, the holders of the different instalments secured by the same mortgage being entitled to participate in the distribution of the proceeds. But it does not follow that the mortgagor, who is bound for the whole debt, notwithstanding the insufficiency of the property mortgaged, can, in an action by the holder of a note for the instalment already due, claim as a right that the property should be sold on such terms, especially when the proceeding is by an ordinary action. *Florance v. Orleans Navigation Company*, 1 R. R. 224.

10. Where property offered for sale under execution is mortgaged to secure the payment of notes, not yet due, with the accruing interest, the purchaser must retain in his hands enough to pay such notes, with interest to the day of sale, not to the period of the maturity of the notes. *Firemen's Insurance Company of New Orleans v. Gillingham and others*, 1 R. R. 305.

11. Where the consideration of a mortgage is not stated in the act, and the mortgagor pleads a failure of consideration, parole evidence is admissible to prove the nature of the consideration and its failure. *Falcon v. Boucherville*, 1 R. R. 337.

12. Where property brings less than the amount of the mortgage of the creditor at whose suit it is sold, all subsequent mortgages fall to the ground, and the sheriff is authorised to erase them. *Hart and others v. Foley*, 1 R. R. 378.

13. The recorder of mortgages, having erased plaintiff's mortgage, without his consent; and the sheriff having sold the land, seized at the suit of the plaintiff, at twelve months credit, and assigned to a third person the bond taken for the price: *held*, that plaintiff may look to the recorder of mortgages for indemnity, or to the proceeds of the sale in the hands of such third persons, at his pleasure. *Burthe and another v. Bernard*, 1 R. R. 395.

14. A mortgage creditor, who buys the property subject to his mortgage, cannot be compelled to pay the purchase money, which he is entitled to recover by preference. *Rodriguez, syndic v. Dubertrand and another*, 1 R. R. 535.

15. The syndic of the creditors of an insolvent is entitled to a commission on the proceeds of the sale of the mortgaged property, though purchased by the mortgagee, who retains the price in discharge of his mortgage claim. *Maxan v. his creditors*, 1 R. R. 560.

16. Ships and other vessels are not susceptible of being mortgaged, except according to the laws and usages of commerce. The validity of an hypothecation of them, will not be recognized in any other cases; and there is no distinction in this respect between

vessels trading with foreign ports, and those which do not leave the State. *Hill v. Phœnix tow-boat Co.*, 2 R. R. 35. *Hill v. De Lizardi*, 2 R. R. 89.

17. A mortgagee who seeks to enforce his mortgage against third persons, must prove that it has been duly recorded. *Cassidy v. his creditors*, 2 R. R. 47.

18. The sale of an immoveable by the syndic of the creditors of an insolvent, cannot affect the rights of a creditor who never made himself a party to the insolvent proceedings, having a mortgage with a *pact de non alienando*. He may seize and sell the property into whosoever hands it may have passed. But where, by appearing at the meeting of creditors and fixing the terms of sale of the mortgaged property, he has made himself a party to the *concurso*, he will be considered as having waived this right, and must look to the proceeds in the hands of the syndic, whom he has made his agent. *Egerton, &c. v. their creditors*, 2 R. R. 201.

19. Where property, subject to a special mortgage does not sell for enough to satisfy the mortgage, the mortgagee becomes an ordinary creditor for the difference; and if there be nothing for such creditors, he must lose the surplus. *Salzman v. his creditors*, 2 R. R. 241.

20. The owners of notes executed each for a portion of the price of property, and secured by the same mortgage, are entitled to be paid out of the proceeds of the property, in proportion to the amount of the notes owned by them respectively. *Id.*

21. Where the holder of a claim secured by mortgage, assigns a part of it, he cannot come in competition with his assignee, if the property prove insufficient to pay both. Though he warrant only the existence of the debt at the time of the transfer, it would be contrary to good faith to permit him, after receiving the price from his assignee, to prevent the latter from recovering the amount paid by him. *Id.*

22. The possession of a promissory note, payable to order, and endorsed in blank, is *prima facie* evidence of title, the property passing by delivery. No other transfer is necessary to entitle a party to avail himself, *via ordinaria*, of a mortgage given to secure its payment; but to proceed, *via executiva*, the mortgage must be transferred by an authentic act. *Fitzwilliams v. Wilcox*, 2 R. R. 303.

23. Where a mortgage contains the clause *de non alieanando*, no transfer of the property can affect the mortgagee's right to proceed against it summarily, as if still belonging to the mortgagor. *Murphy v. Jandot* 2 R. R. 378.

24. The right of a mortgage creditor is on the thing itself, and may be exercised into whatever hands it may pass. *Succession of field*, 3 R. R. 5.

25. A sale by the administrator of a succession of property held by the deceased, subject to a mortgage, gives the mortgagee no

claim against the succession. His rights cannot be affected by such a sale; and he must pursue the property in the hands of the subsequent third possessor. *Succession of Field*, 3 R. R. 5.

26. A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage on his immoveables. C. C. 2367, 3182. *Stafford v. Dunwoodie*, 3 R. R. 276.

27. Where a mortgage recites, that the mortgagor wishes to place the mortgagee *à l'abri de ses avances d'argent, et des effets des endossements que celui-ci voudra bien lui fournir*, it will be considered as having been given to secure past, as well as future advances. *Succession of De Armas*, 3 R. R. 342.

28. Acts granting mortgages will, in cases of doubt, be strictly construed. *Id.*

29. Where a note secured by mortgage, is prescribed, the mortgage is necessarily extinguished. A mortgage can only exist as an accessory to a principal obligation, with the extinction of which it disappears. C. C. 3251, 3252, 3374. *Auguste v. Renard*, 3 R. R. 389.

30. The transfer of a negotiable note, by endorsement, operates a transfer of any mortgage given to secure its payment. C. C. 2615. *Id.*

31. A rail-way is not an immovable, either by nature or destination, when the soil on which it is laid belongs to another; it is, consequently, not affected by judicial or legal mortgages, nor susceptible of being mortgaged unless authorised by a special act of the legislature. *State v. Mexican Gulf Rail-Way Co.*, 3 R. R. 513.

32. Future property can never be the subject of conventional mortgage. C. C. 3276. *Id.*

MORTGAGES.

1. Where mortgages have ceased to exist by virtue of a probate sale, the fact that they still appear on the books of the recorder of mortgages, will not authorize the purchaser to withhold payment of the price. *Hoey, &c. v. Cunningham*, 14 L. R. 86.

2. In a proceeding by writ of seizure and sale, against mortgaged property which has passed into the hands of a third possessor, *three days notice* must in all such cases be given to the defendant, after seizure, before the property is advertised for sale. *Saillard v. White*, 14 L. R. 84.

3. Where the vendor promised to cause the general mortgages existing on certain lots at the time of sale to be erased and cancelled, and it is ascertained that they are already extinguished by the probate sale and the want of re-inscription for more than ten years, the purchaser cannot excuse himself from paying the purchase mo-

ney from want of the erasure. *Gravier's curator v. Hodge*, 14 L. R. 101.

4. When it is shown the mortgages were all previously extinguished by probate sale, and for want of re-inscription, the *promise* to have them erased from the books of the mortgage office is vain and creates no obligation. *Id.*

5. So, when judicial or conventional mortgages are extinguished by a probate sale, or for want of a new inscription at the end of ten years, the recorder of mortgages should *note* them on his books, and not include them in his certificates as existing. *Id.*

6. Where property is sold at probate sale for less than the sum for which it is mortgaged, the mortgage creditor can only be placed on the tableau with a privilege for the amount of the sale; and for the balance of his claim he must be set down as an ordinary creditor. *Baldwin v. Criswell*, 14 L. R. 166.

7. A mortgaged creditor is entitled to a writ of sequestration against the mortgaged property, whenever he apprehends it will be removed out of the State before he can have the benefit of his mortgage; and in such cases, a writ of sequestration can be granted in the absence of a principal demand pending before the Court granting it. *Williams v. Duer*, 14 L. R. 531.

MORTGAGE AND PRIVILEGE.

1. A mortgage executed after the debtor has sworn to his schedule and applied for the benefit of the insolvent laws, is invalid, as a disguised attempt to give a preference to this creditor over others, after a sworn declaration of bankruptcy. *Granet v. his creditors*, 15 L. R. 122.

2. Where a mortgage has been raised and cancelled under defective powers, by an attorney in fact, yet when actually cancelled under them, and subsequently released by the mortgagee, purchasers, in the mean time, of the property, will be protected. *Ball's administratrix v. Ball et al.*, 15 L. R. 173.

3. Where a third possessor of mortgaged property, *assumes*, to pay the original vendor, he becomes the immediate debtor of the latter who may waive his rights upon his vendee and proceed directly against the third possessor, without the notice required by the 69th article of the Code of Practice. *Woodward v. Dashiell*, 15 L. R. 184.

4. The renewal of notes given as evidence of an hypothecary or privileged debt, and an extension of time, is not *per se* a novation or extinguishment of the mortgage or privilege. *Saul v. Nicolet's executors*, 15 L. R. 246.

5. The vendor has no privilege or lien on the furniture in the house when it is abandoned or let by his vendee, and he sues for

a rescission of the sale. He can only claim his rents or fruits while the vendee had it in possession. The privilege grows out of the contract of lease, between landlord and tenant. *Derepas v. Shallus*, 15 L. R. 371.

6. Where a plasterer drew a draft on the owner, and stated in it, that it was for plastering done on his building, the acceptance was an admission that the drawer was entitled to a privilege, under art. 3216, number 2, of the Louisiana Code, and which passed to the owner of the draft. *Burthe v. Donaldson et al.*, 15 L. R. 382.

7. The purchaser of property previously mortgaged takes it subject to the balance due on such mortgage, whatever it may be, and retains this sum in his hands over and above the price he bids, to be paid to the rightful owner. *Allin et al. v. Beamis*, 15 L. R. 385.

8. A purchaser of property subject to a lien or privilege, is liable for the amount, and will be compelled to pay it, or give up the property. *Diggs v. Green et al.*, 15 L. R. 416.

9. Where the evidence shows that the husband has received and converted to his own use the paraphernal property of his wife, in case of his insolvency, her heirs will have a legal mortgage, superior to that of other creditors, on his estate for its restitution. *St. Martin v. his creditors*, 15 L. R. 419.

10. The art. 739 of the Code of Practice points out the only reason for which the sale of mortgaged property, by the executory process can be arrested. *Exchange and Banking Co. v. Walden*, 15 L. R. 431.

11. A mortgage for a principal sum, secures also the interest and costs in enforcing payment. *Id.*

12. Taking a note in renewal of one secured by mortgage, is no novation when the first one is not given up. *Id.*

13. The Court cannot inquire into the terms and conditions on which property mortgaged by special privilege should be sold, which has been given up to the creditors by a *concordat*. *Hodge v. Whitall*, 15 L. R. 506.

14. If the property mortgaged and ordered to be sold to satisfy the judgment, is not sufficient, the defendant not being released by the *concordat*, will be personally bound to pay the balance due on the judgment, if there be any. *Id.*

15. A creditor for supplies furnished a ship or vessel, has a privilege on the vessel for those furnished before *her departure*, if she has already made a voyage; but this voyage must be considered as made to another port, and a return to the *port of departure* before it is completed; otherwise this privilege could never be claimed or enforced. *Blacke v. Bredall*, 15 L. R. 545.

16. Every claim against a vessel or steamboat depending on *the last voyage*, for wages, supplies, &c., for which the Code gives a privilege, will be allowed, when the services or supplies have been

rendered or furnished within and during the last sixty days before suit. *Shirley v. Fabrique*, 15 L. R. 140.

17. Where the purchaser of a specific, but undivided portion of a square of ground, for a particular sum or price, gives his obligations with mortgage to secure payment, this mortgage only extends *to his portion or interest*, and cannot be enforced in the executory proceedings, for any of the obligations of his co-purchasers, although the sale and mortgage is all included in one and the same act. *Walton & Kemp v. Lizardi et al.*, 15 L. R. 588.

18. It was the intention of the parties to acquire such distinct portions of the property conveyed, as might have been made the subject of separate deeds of sale, and that although undivided, the square of ground cannot be said to have been purchased in common; and the payment of the notes of any one purchaser extinguishes the mortgage as to his part, and gives him an absolute and distinct title. *Id.*

19. Although a mortgage is indivisible, and prevails over each and every portion of the property, yet when the obligations given for a part only, of the whole property, are paid, the mortgage being but the accessory, is extinguished. *Id.*

20. So, where co-purchasers of distinct and separate portions of undivided property, jointly mortgage it to secure payment of the price, yet when any one pays for his portion, the mortgage is extinguished as to that part. *Id.*

21. An order of the Probate Court, erasing the legal and special mortgage of a minor, under the act of 1830, and giving a special mortgage *on part only*, of the property of the tutor in lieu of the first, cannot be attacked collaterally, when third persons have purchased property released by these proceedings; it must have its effect until reversed or annulled in a direct proceeding or action. *LeBlanc v. his creditors*, 16 L. R. 120.

22. A mortgage is in its nature indivisible, and prevails over every part of the immoveable subjected to it; and the mortgaged premises must be sold to satisfy the whole debt it was taken to secure, and not a part thereof. *Pepper et al. v. Dunlap*, 16 L. R. 163.

23. A seizing creditor, who only sues for such instalments of a debt secured by privilege or mortgage as are due, the property so mortgaged is to be sold *for the whole of the debt*, on such terms of credit as are granted by the original contract; although such creditor does not show that the notes of the subsequent instalments belong to him, or that he is the holder of all the notes included in the mortgage. *Id.*

24. Where the demand exceeds five hundred dollars, for work and labor done, and materials furnished in repairing houses, there must be a registry of some act or written agreement, in order to give a privilege on the property or its proceeds, in the hands of

the administrator. *Taylor et al. v. Crain's administrator*, 16 L. R. 290.

25. Two requisites are indispensable, as between the employer and undertaker, for the creation of the privilege, which are, that the agreement must be in writing, and registered in the office of register of mortgages. *Id.*

26. The price of property subject to a privilege, sold before the decease of the owner, when collected by his administrator, is free of privilege, and must be distributed among the ordinary creditors. *Id.*

27. Privileged claims for work and materials, on a house, are prescribed by the lapse of six months, if they are under five hundred dollars. *Id.*

28. A mortgage may be given to secure endorsements made and to be made, and which are not due at the time of executing it. *Brander et al. v. Bowmar & Abercrombie*, 16 L. R. 370.

29. So a prior mortgage to secure endorsements not made will have a preference over a judgment creditor whose judgment is not recorded, when there is no proof of knowledge of the insolvency of the debtor at the time by the mortgagee. *Id.*

30. An assumed note by a vendee, bearing the first mortgage must be paid in full, before those he gives can come in under his mortgage. *McMahan v. Grant & Turnell*, 16 L. R. 479.

31. The vendor of lots, when opposed by the builder's claim, and privilege on buildings erected, is entitled to have the ground appraised separately from the houses, and to be paid from the proceeds of the ground, separately from that of the buildings. *Cordeviolle & Lacroix v. Hosmer*, 16 L. R. 590.

32. The appraisement must be made by persons chosen by the vendor and builder; neither of whom can be concluded by an appraisement made without his knowledge. *Id.*

33. The renewal of the registry of a mortgage after the lapse of ten years from the recording, cannot avail the mortgagee against an ordinary third possessor, or subsequent mortgagee. *Dupuy v. Dashiell*, 17 L. R. 60.

34. But where a subsequent purchaser assumes the payment of the mortgage debts due the original vendor, he cannot avail himself of the want of re-inscription of the original mortgage, within the ten years. *Id.*

35. Where the subsequent purchaser, assumes the mortgage debts of his vendor to the original seller with a clause, that the plantation and slaves remain specially mortgaged to secure their payment, it has the effect of giving a new right of mortgage to the original vendor. *Id.*

36. The subsequent purchaser and third possessor who assume the debt of his vendor, can also avail himself and plead any payments the vendor may have made and which have not been allowed. *Id.*

37. The taking a mortgage on a vessel by notarial act to secure loans or notes due by the owner on account of the vessel, does not confer any right or privilege whatever; ships not being susceptible of mortgage. *Grant v. Fiol et al.*, 17 L. R. 158.

38. So a creditor for advances or loans in money made to the owner and applied to the use of the vessel, has no privilege allowed him by law. *Id.*

39. Attaching or seizing creditors are entitled to a preference over ordinary creditors; and over each other, according to the order of their seizures. *Id.*

40. Claims for towage are not entitled to a privilege, it not being expressly allowed by law. *Id.*

41. Where property is mortgaged to the Bank of Louisiana and is sold by the administrator of the estate, by order of the Court of Probates, the Bank, by the provisions of its charter, is not bound by the probate proceedings, alone, and the purchasers do not take the property free of incumbrance, but subject to the Bank's mortgage. *Williams v. Bank of Louisiana*, 17 L. R. 378.

42. Judicial mortgages resulting from recorded judgments of creditors of a tutor, acquired under the faith and protection of a Court of competent jurisdiction, which had never been annulled or attacked, will be satisfied in preference to the minor's general mortgage, purporting to have been raised by this judgment. *Lessassier v. Dashiell*, 17 L. R. 194.

43. But where the proceedings in the Court of Probates do not conform to all the provisions and formalities of the law required in giving special, in lieu of general mortgage, the judgment rendered therein is not sufficient to protect purchasers against the minor's general mortgage. *Id.*

44. The syndic is without authority to raise mortgages existing on property surrendered in favor of persons, before it passed into the hands of the insolvent and who are not his creditors. *Foley v. Dufour et al.*, 17 L. R. 521.

45. The first and oldest mortgagee, who purchases in the premises is subrogated to all the rights under this mortgage, sufficient to repel a younger mortgagee seeking to disturb him. *Seghers et al. v. Courcelle*, 17 L. R. 551.

46. There is no privilege allowed by law in favor of daily or monthly laborers employed in a saw-mill. *Barbour et al. v. Duncan's curator*, 17 L. R. 439.

47. Lessors have the highest order of privileges expressly given, by taking or seizing the moveable effects of the lessee found on the property leased. *Id.*

48. A third purchaser of an estate, subject to certain mortgages, which she assumes to pay, cannot set up her own claims in opposition to the mortgage creditor on said estate. *Kenner & Co.'s syndic v. Holliday et al.*, 19 L. R. 154.

49. Where notes are given in renewal of those sued on, although

such renewal may not operate a novation, so as to affect the mortgage by which ultimate payment is secured, no recovery can be had until the new notes are produced. *Plicque & Le Beau v. Perret, &c.*, 19 L. R. 318.

50. The value of the hire and use of slaves, mortgaged and put in possession of the mortgagee, to indemnify him, against an endorsement, will be allowed in compensation of the amount actually paid by him as endorser. *Hutching's widow and heirs v. Johnson's heirs*, 19 L. R. 437.

51. A mortgage executed by the maker of a note, to secure the endorsers, becomes null when there are no steps taken to fix their liability; and the transfer to the holder of the note after the endorsers are discharged for want of protest and notice, confers no rights on the transferee. *Peets v. Wilson*, 9 L. R. 478.

52. The fact of an endorser taking a mortgage from the maker of a note to indemnify him against loss, does not dispense with demand protest and notice. *Id.*

MOVEABLES.

1. Where the rights of a party to a succession, consist only in right to a portion of the proceeds of the sale of the property, either in money, or in notes given for the price, it will be considered purely moveable; and this, though the notes should be secured by mortgage on the real estate sold. C. C, 466, 467. *Bonneau v. Poydras*, 2 R. R. 1.

NEW-ORLEANS.

1. The act of 1832, for opening and improving streets in New-Orleans does not authorize the commissioners to asses a tax on the neighbouring proprietors of grounds, for the purpose of clearing, grading, draining and improving streets in their vicinity, already opened and dedicated to public use, when no portion of the disbursements is for lands taken, or to be taken for new streets. *Municipality No. 2 v. McDonough*, 16 L. R. 533.

2. The act of 1832, is enacted for the exclusive and special object of authorising the City Council to take lands or lots, to remove any buildings or improvements necessary for the purpose of opening, extending, enlarging, &c., or otherwise improving any street or public place, on due compensation being made to the parties and persons to whom the loss and damage occasioned thereby exceeds the advantage and benefit thereof. *Id.*

3. An opposition to the proceedings and report of commission-

ers, under the act of 1832, for opening streets, &c., which is in the nature of a peremptory exception, destroying the right and power assumed by the corporation, alleging the proceedings to be null, *ab initio*, may be put in at any time before judgment homologating the report. *Municipality No. 2 v. McDonough*, 16 L. R. 533.

4. The city limits of New-Orleans terminates at the outer edge of the levee, towards the river Mississippi, which is by law the bank of the river, and the line of division between the municipalities consequently terminates there. *Municipality No. 2 v. Municipality No. 1*, 17 L. R. 573.

5. The direction of the wharves, necessary to be built after the division of the city into municipalities, is governed by different rules from the line of division on shore. Each municipality should construct the wharves within its limits at right angle to the levee, by running square into the river. *Id.*

6. So, where the Municipality No. 1 extended its wharf at the divisional line *diagonally into the river*, in the direction of the course of the dividing line on shore, it was ordered to be demolished, and the wharf to be made at right angles with the bank of the river. *Id.*

7. A contract entered into by the corporation of New-Orleans before its division into municipalities must be enforced against the whole city, or the commissioners of the sinking-fund representing it; and not against any one of the municipalities separately, although the work performed may have enured to its particular benefit. *Lerey v. Municipality No. 3*, 18 L. R. 312.

NEW-ORLEANS, CITY OF

1. Assessments made under the act of 2d April, 1832, regulating the opening and improvement of streets and public places in the city of New-Orleans, are privileged as to third persons, only from the time of inscription in the office of the recorder of mortgages. *City Bank of New-Orleans v. Huie*, 1 R. R. 236.

2. The First Municipality has not succeeded to the rights and privileges of the inhabitants of the old City of New-Orleans, nor to those of the corporation created by the act of 17th February, 1805, and the acts supplementary thereto. It is the creature of the act of the 8th of March, 1836; and to it, and the acts amending it, we must look for its powers and rights. *First Municipality of New-Orleans v. Commissioners of the General Sinking-Fund*, 1 R. R. 279.

3. The corporation of the city of New-Orleans which existed previously to March, 1836, is in a state of liquidation, and is represented in all things relating to its settlement and rights by the mayor and the commissioners of the sinking-fund. The real pro-

perty which belonged to it at the time of its dissolution, belongs to the municipality in which it is situated. *First Municipality of New-Orleans v. Commissioners of the General Sinking-Fund*, 1 R. R. 279.

4. Under the act of 8th March, 1836, dividing the city of New-Orleans into three municipal corporations, each of the municipalities is authorised to acquire, enjoy, alienate, mortgage, or otherwise dispose of all kinds of property, real, personal, or mixed; and such purchase may be for cash, or for a price payable at a future period. *Third Municipality of New-Orleans v. McDonough*, 2 R. R. 244.

5. A purchase of real estate by one of the Municipalities of the City of New-Orleans, with a view to divide it into lots and streets and to re-sell the same, for the purpose of improving the cleanliness and salubrity of the city, and the convenience of the streets is legal. Act 14th March, 1816. *Id.*

6. A bequest of a sum of money, to the orphans of the First Municipality of New-Orleans, may be claimed and recovered by the City Council of that municipality, who are authorised to regulate its distribution among the objects of the tutor's bounty. C. C. 1536. *Succession of Mary*, 2 R. R. 438.

7. Where on an application under the act of 3d April, 1832, for the appointment of commissioners to assess the damage or advantage resulting to the owners of ground, required for the opening or improving of streets or public places in the City of New-Orleans, or adjacent to such improvements, it is alleged in the petition that the proposed improvements tend to the benefit and improvement of the whole corporation, the commissioners will be relieved from the duty of inquiring whether they are of a local or general character, and the municipality, by which they were ordered to be made, will be bound to the owners for whatever amount they would have been liable under the act, had the commissioners expressly declared such improvements to be beneficial to the whole corporation. *New-Orleans, &c., for extension of Barrack street*, 2 R. R. 491.

8. Section 4 of the act of 14th March, 1816, which provides that, neither the mayor, recorder, nor any alderman then in office, shall be allowed, in his own name, or through the medium of others to become a lessee or bidder for any branch of the revenues of the city, nor for any work or undertaking whatever which may be authorised or ordered by the corporation of the City of New-Orleans, cannot be considered as prohibiting such persons from leasing any lot of ground or other property, not forming an entire branch of the revenue of the city. *Second Municipality of New-Orleans v. Caldwell*, 3 R. R. 368.

9. Under the ordinance of the Second Municipality of New-Orleans, of 12th July, 1836, which declares, that the tax levied on the owners of the property for the reimbursement of their portion of the expense of paving, shall be paid in cash within ninety days

after the work is done, or in notes endorsed to the satisfaction of the committee of finance, at six, twelve, eighteen, and twenty-four months, bearing interest at the rate of eight per cent a year, interest at that rate, may be recovered from a property-holder who has neglected to pay, within the ninety days, the amount assessed as his share of the costs of such pavement. *Second Municipality of New-Orleans v. McFarlane*, 3 R. R. 406.

NEW-ORLEANS & CARROLLTON RAIL-ROAD Co.

1. By the first section of the act of 1st March, 1836, amending the charter of the New-Orleans and Carrollton Rail-Road Company, it is provided, that the company shall pay to the State, in ten equal annual instalments from the acceptance of the present act, seventy-five thousand dollars to be employed by the State for the completion of the Attakapas canal through lake Verret, whenever such improvements shall have been undertaken and the work actually commenced by the State, or by any company legally chartered for the purpose. In an action, under this act, by the State, against the company, who had accepted the act, for the instalments due: *held*, that the State is entitled to recover, whether the works or improvements have been commenced or not; and that the defendants have nothing to do with the appropriation of the amount they contracted to pay. *State v. New-Orleans and Carrollton Rail-Road Co.*, 3. R. R. 418.

2. The liability of the stockholders in the New-Orleans and Carrollton Rail-Road Company under their subscriptions, is not affected by the act of 14th March, 1839, relieving the Banks from the forfeiture of their charters. If a further call upon those who have not paid in full, be necessary for the discharge of the debts of the company, the directors are authorised to make it. *Millaudon v. New-Orleans and Carrollton Rail-Road Co.*, 3 R. R. 488.

NEW TRIAL.

1. In an application for a new trial, on the ground of newly discovered evidence, in the absence of the party, the attorney who conducts the suit is competent to make the necessary affidavit, when the facts are within his knowledge. *Williams v. Brashear*, 16 L. R. 77.

2. So, in an action against the drawer of a bill, where the attorney swears that since the trial he has discovered a certain person who will prove that the defendant had sufficient funds in the hands

of the acceptors to pay the bill, it is a good grounds for a new trial. *Williams v. Brashear*, 16 L. R. 77.

3. In an affidavit for a new trial, on the ground of newly discovered evidence since the trial, the party must not only show that he used every effort in his power to procure the evidence, but also that it is admissible and material under the pleadings. *Landry v. Baugnon*, 17 L. R. 82.

4. So in a motion for a new trial after judgment by default is made final, newly discovered *evidence of payment* is insufficient, as it would not be admissible without new pleadings or answer filed; and no amendment of the pleadings will be permitted after judgment. *Id.*

5. When new evidence on which a new trial is based, is discovered while one of the party's witnesses is under examination, he should immediately move for a continuance, allowing time to procure the newly discovered evidence. *Davis v. Davis's syndic*, 17 L. R. 259.

6. A party dissatisfied with the verdict of a jury, is expressly allowed three days in which to move for a new trial; but he may waive this right; and he will be considered as having done so, when he neglects to avail himself of it. Having waived this right, he cannot claim relief in this Court; especially when he opposed the adverse party's attempt to obtain a new trial. *Nattles v. Scott*, 17 L. R. 336.

7. It is different in relation to new trials asked from *the Court*. The party may well imagine he cannot change the decision, when he has no new argument to offer to the same judge who rendered the first judgment; but a new jury sits in the second or new trial. *Id.*

8. Where one of the jurors becomes interested in the case during the trial, it is good ground to award a new trial. *Turner v. Latorre et al.*, 18 L. R. 74.

9. Where it is clear a cause is not in proper *condition* to decide on the important and delicate question involved, and the justice of the case requires it, *it will be remanded for a new trial*, rather than a judgment of non-suit entered. *Morehouse's heirs v. Mayor et al.* 18 L. R. 316.

10. Motions and affidavits for new trials on the ground of newly discovered evidence should be received with great restriction and much caution. *Burton v. Maltby*, 18 L. R. 531.

11. A new trial should not be granted, to enable the party to prove the tender of a slave in a redhibitory action, on the ground of an oversight in his counsel to prove it on the trial, when it does not appear, any diligence was used to procure proof. *Houghteling v. Fischer*, 19 L. R. 475.

12. The discretion of the Supreme Court, to remand causes for a new trial, will be exercised only in extreme cases, when the party

has shown due diligence and he is guilty of no laches. *Houghteling v. Fisher*, 19 L. R. 475.

13. An allegation by defendant, on a motion for a new trial, that a witness testified to admissions made by him in an unsuccessful attempt to compromise, will be disregarded, unless accompanied with an affidavit that he was ignorant of the circumstances at the time of the trial. *Burke v. Brazeale and another*, 1 R. R. 73.

14. A new trial will not be granted on the ground of newly discovered evidence, where the Court, is not satisfied that the party could not, with proper diligence, have discovered and obtained it before the trial, and where the affidavit contains no allegation of its importance and materiality. *Bonnet v. Legras*, 1 R. R. 92.

15. A new trial should never be granted, when the ends of justice have been attained. *Mason v. Louisiana State Marine and Fire Insurance Company*, 1 R. R. 192.

16. Motion for a new trial by plaintiff, in an action to annul a mortgage, on the ground that the clerk of the parish judge before whom the mortgage was executed, had entered into a conversation with five of the jurors, while they were at dinner, during a recess of the Court and before the argument had ended, and told them that, if they annulled the mortgage, their own mortgages, if they had any, would also be annulled. *Held*, that the motion was correctly overruled, there being no evidence that any fact was communicated which had not been sworn to on the trial, nor that any of the jury were interested in the question. *De Blanc v. Martin*, 2 R. R. 82.

17. The admission of irrelevant testimony is no ground for remanding a case for a new trial, where its exclusion would not probably vary the result. *Ferguson v. Whipple*, 3 R. R. 344.

18. Objections to a verdict lose much of their weight, when not made before the Court which tried the case originally. A case will be less readily remanded on a question of fact, where a new trial has not been moved for below. An appeal from the judgment of an inferior tribunal, founded on a verdict, should only be taken after the refusal of a new trial. *Hughes v. Lee*, 3 R. R. 429.

NON SUIT.

1. Defendant stipulated, as part of the price of a lot of ground and certain bank stock, which was to be delivered immediately, to pay a note due by his vendor to the plaintiff; the stock was not transferred, nor the contract cancelled. In an action by the plaintiffs on the note: *held*, that the judgment in favor of defendant should be one of non suit, as the stock may still be delivered. *City Bank of New-Orleans v. Desban and others*, 1 R. R. 570.

NOTARY.

1. The want of a seal to the certificate of a Notary, will be no objection to its admission in evidence. No law requires that a notary furnish himself with a seal. *Lambeth and another v. Caldwell and others*, 1 R. R. 61.

2. Under the act of 14th February, 1821, the certificate of a notary will not be sufficient proof of notice of protest unless attested by two witnesses. *Deblieux and another v. Bullard and another*, 1 R. R. 66.

3. A notary, commissioned by the judge of the Court of Probates to make the partition of community property, is the ministerial officer of the Court; and on his certificate of a refusal by the party in custody of the property to produce the same, a *distringas* may be issued to enforce a compliance. *Stewart v. Pickard and others*, 1 R. R. 415.

4. Where different notes of the same institution are held by the same individual, the notary having to make a separate demand on each, may refuse to include them all in a single protest, and claim the costs of protesting each. *Trezevant and others v. Bank of Tennessee*, 1 R. R. 465.

5. The certificate of a notary, that no note signed or endorsed by a particular person was protested by him within a certain period, is inadmissible. A notary can only certify copies of proceedings in his office; any other fact within his knowledge must be disclosed under oath. *Exchange and Banking Company of New-Orleans v. Boyce*, 3 R. R. 307.

6. The fees to which a Notary public is entitled for his services being fixed by law, he cannot, under any pretence, demand additional compensation. *Watton, &c. v. their creditors*, 3 R. R. 438.

NOTARIES.

1. The Notary must state facts, and show what he has done to find out *the residence* of an endorser, and give notice of protest; and not merely to assert in general terms that he *made diligent enquiry* and was unable to ascertain it. *Fleming et al. v. Hill*, 17 L. R. 1.

2. So when the Notary's clerk testified that he had made diligent enquiry and endeavored to find out the residence of the endorser, but in vain; it was held to be insufficient. The particular facts must be shown to enable the Court to determine if *proper diligence* has been used. *Id.*

3. The presumption resulting from the official character and certificate of the Notary is, that due demand was made of the drawer or maker of a note; and the *onus* is upon the adverse party

to show that they failed to recover of their immediate endorser for want of due demand and notice, in a case where the notary was not a party. *Oakey et al. v. Bank of Louisiana et al.*, 17 L. R. 386.

4. A Notary will not be allowed to testify to any thing which contradicts or strengthens his official acts as declared and set forth in his certificate of protest. *Id.*

5. Where a note discounted in Bank is not legally protested so as to bind all the endorsers, the Bank alone is responsible to the injured party by the neglect of the Notary. There is no privity between this party, and the Notary, who is the agent of the Bank. *Id.*

6. The Notary must find out the domicil of the maker of a note, and make demand there, when no place is designated and personal demand cannot be made. *Id.*

7. A Notary will not be permitted to alter his record of the protest and notice to endorsers, by interlining and inserting the manner or circumstances of giving notice, which he or his clerk may have omitted. *Peyroux et al. v. Davis*, 17 L. R. 479.

8. Where the defendants put a note, which had been deposited with them for collection, into the hands of their Notary who failed to make a record of his protest and notice to the endorsers by which the latter were discharged: *held*, that the Notary and his sureties, and not the Bank are liable. *Hyde & Goodrich v. Planter's Bank of Mississippi*, 17 L. R. 560.

NOTICE.

1. Where it is provided by a rule of Court, that in all cases where notice is required, and no time is specified in the Code, three days shall be sufficient, a rule taken on the 29th of June to show cause on the 1st of July, will not be sufficient notice. *Erwin v. McKinney and another*, 1 R. R. 217.

2. After issue joined, suitors are presumed to be always in Court, attending to their business, either in person or by their counsel, and are consequently bound to notice the steps taken in their cases. *Kown, syndic and others v. Wagner and another*, 1 R. R. 275.

NOVATION.

1. Where the seller delivered the notes of the purchaser which he had received for the price, in exchange for the notes of other persons, the debt due by the purchaser was thereby novated; and his warranty does not extend to the solvency of the makers and endorsers of the notes given in exchange. *Barthet v. Andry*, 14 L. R. 30.

2. The mere renewal of notes with an endorser, and making partial payments, does not operate a novation, nor deprive the vendor of his privilege on the thing sold, in the hands of the vendee. *Saul v. Nicolet's executor*, 15 L. R. 246.

3. So, the renewal of notes given as evidence of an hypothecary or privileged debt, and an extension of time, is not *per se* a novation or extinguishment of the mortgage or privilege. *Id.*

4. To create a novation by the substitution of a new debtor, the latter must oblige himself towards the creditor, in lieu of the original debtor, and it must appear that the creditor expressly discharged the first debtor. *Bonnemer v. Negrete*, 16 L. R. 474.

5. The giving an order on a particular fund for the amount of a note or debt, when the original debtor is not discharged, does not operate a novation of the debt. *Id.*

6. Where notes are given in renewal of those sued on, although such renewal as between the parties may not operate a novation, so as to affect the mortgage by which ultimate payment is secured, yet the plaintiff cannot recover without producing or satisfactorily accounting for the notes given in renewal. *Plicque & Lebeau v. Perret, &c.*, 19 L. R. 318.

7. The acceptance by a creditor of an order from his debtor on a third person, the proceeds to be applied towards the payment of his claim, when such order was not intended to operate a novation by substituting a new debtor, will not discharge the original debtor. *Baird and others v. Livingston*, 1 R. R. 182.

8. Plaintiff was holder of defendant's note for the purchase of a lot, subsequently sold by the latter to a third person, who bound himself to pay the note. Plaintiff did not intervene in the act of sale from the defendant, and expressly declare by signing it that he accepted the vendee as his debtor; but he always looked to him as such, received payments from him, sued in his own name on the agreement in the contract between him and the defendant, and, after obtaining judgment, granted him delay on conditions more onerous to defendant than any he had agreed to: *held*, that defendant was discharged. *Walton v. Beauregard*, 1 R. R. 301.

9. The substitution of a second note, payable to different payees, in place of the first, is a novation of the debt. *Wellington v. Scott*, 2 R. R. 59.

10. A debtor does not, by the indication of another as the person to whom he is to pay, become the debtor of the latter; he continues to be the debtor of his original creditor. *State v. New-Orleans and Carrollton Rail Road Co.*, 3 R. R. 418.

NULLITY.

1. The nullity resulting from a prohibited sale to executors of

property of the succession administered by them is *absolute*. No subsequent ratification can give it effect against third persons *interested*, who are not parties to the ratification. *Scott's executrix v. Gorton's executor*, 14 L. R. 115.

2. The ratification of an absolute nullity can have no retroactive effect, but is a new title, and cannot prejudice the rights of third parties previously acquired, whilst a relative nullity relates to the original act. *Id.*

3. The nullity of a probate sale cannot be sought in a direct action in the District Court. The order of sale by the Probate Court is held to be a judgment which protects purchasers under it. *Graham's heirs v. Gibson*, 14 L. R. 146.

4. So, where heirs sue in the District Court, to recover from the purchaser and third possessor of property sold at the probate sale of their ancestor's estate, on the ground that the proceedings and sale by the Court of Probates were illegal, and should be cancelled and annulled: *held*, that this is in the nature of an action of nullity, and the District Court is without jurisdiction. *Id.*

NULLITY OF JUDGMENT.

1. Where a Judgment has been obtained against a party in a case not expressly included among those in which the Code of Practice prescribes that an action of nullity will lie, and he shows that he will sustain real injury unless he can obtain relief; which cannot be had on appeal and the case presents facts on which, in the other States of the Union, a Court of equity would interfere, relief may be granted; but not unless the applicant state particularly and specially the nature of the defence, and the facts on which he seeks relief, and prove that he has been guilty of *no laches*. It will not suffice to allege, that he has good and valid defence to the action. *Chinn v. 1st Municipality of New-Orleans*, 1 R. R. 523.

OBLIGATION.

1. Where the purchaser and ten other persons bound themselves *jointly*, to reimburse the seller the amount of certain notes given to him, if not paid at maturity, each one will only be liable for his proportion of the loss. *Barthet v. Andry*, 14 L. R. 30.

2. So, where the purchaser, supposing himself bound *in solido*, when he was only *jointly liable*, with others, made a contract for the payment of the whole claim under this belief: *held*, that it was an error of law, and he is entitled to be relieved from his obligation. *Id.*

3. Where an undertaker gave an order to his plasterer, on the owner, payable out of the second and third instalments of the price of building, when the house was finished, which was accepted: *held*, that no subsequent agreement between the undertaker and owner, prolonging the time of finishing the house, could change the obligation of the acceptor of the order, although the house was destroyed by fire in the mean time. *Sargeant v. Daunoy*, 14 L. R. 43.

4. Neither party to a contract has any power to change his obligations to a third party growing out of said contract, by subsequently altering or prolonging its execution as between themselves. *Id.*

5. The promise to pay a debt at certain periods, if a note given to the creditor for collection was *not collected*, is not absolute but conditional; and as the collection of the note would have extinguished the debtor's obligation, so if it has not been collected, through the fault of the creditor, the consequence must be the same. *Moore et al. v. Cochran*, 15 L. R. 233.

6. Where a note is given in consideration of the plaintiff's promise to have a certain tract of land laid off into town lots, and the share of each subscriber conveyed to him, it is a contract creating reciprocal obligations, and the plaintiff is bound to convey, or show his readiness and ability to perform his part of the contract; and failing to do so, cannot recover on the note. *Brashear v. McMasters et al.*, 15 L. R. 282.

7. In contracts containing reciprocal obligations, the party bound to convey must convey, or show his readiness and ability to perform his part of the contract, before he can compel the other to pay the price. *Id.*

OBLIGATIONS.

1. Where persons representing a succession executed their notes to the creditor for the original debt due by it and secured by mortgage, their obligation is in the nature of the *pactum constitutæ pecuniæ*, engaging their *personal liability*, that the debt should be paid within a certain time, or the creditor be at liberty to seek payment according to his original right on his mortgage. *McDonough v. Relf & Zacherie, &c.*, 19 L. R. 100.

2. If the new obligation be for more than was legally or actually due on the original one, the mistake being discovered, *the pact or new obligation* is void *pro tanto* for want of a debt which was the foundation of it. *Id.*

3. The recognition of a debt is always to be understood with reference to a *primordial title*; and if the party is obliged further,

or otherwise than as the primary title imports, on showing the error he will be releived. *McDonough v. Relf & Zacharie, &c.*, 19 L. R. 100.

4. So, where R & Z being heirs of a succession and administering it as executors, gave their notes to the creditor by the original debt and mortgage, who reserved the right to go upon the mortgage if the notes were not punctually paid, and did so after the payment of the first note; and in which the debt was ascertained by a judgment to be *much less* than the amount for which the new obligation was given: *held*, that there was error for this amount and the new obligation can have no effect. *Id.*

5. Bullard J. and Martin J. *dissenting*. The failure to give notice of the extinguishment of a mortgage, did not forfeit accruing interest; it only authorised a *suspension* of payment. Interest still runs in such a case, although not exigible. *Id.*

6. If it be of the essence of the *pactum constitutæ pecuniæ* that there should be a pre-existing debt, it is only to distinguish it from a donation; but it suffices if the debt, the payment of which is promised, should be due *in foro conscientiæ*; and that there should exist a just subject for payment, although it may be in *foro legis* declared null. *Id.*

OFFICE.

1. Where an act of the legislature creating the office of President of the Board of Public Works, provides that the Governor, as soon as may be after the passage of the act, *and every two years thereafter*, shall nominate and appoint, &c., a President of the Board of Public Works: *held*, that the word thereafter referred to its first antecedent, to wit, the passage of the act, and that the *duration* of the office is to be reckoned every *second year* from the date of the act, and a new appointment made accordingly. *Bry v. Woodrooff*, 13 L. R. 556.

OFFICERS.

1. A sheriff who is the nearest relation, and son of one of the parties, is not incompetent to act and execute process in the case. It is a pecuniary interest alone that renders him incompetent. *Dawson v. Duplantier*, 15 L. R. 289.

2. The signatures and official capacities of public officers, purporting to act as such in foreign countries, must be proved, *when contested*, in our Courts, as other facts. There is an exception as to

notaries or others protesting bills of exchange. *Waldron et al. v. Turpin*, 15 L. R. 552.

3. The acts of an officer to whom a public duty has been assigned are *prima facie*, taken to be correct, and within his power and authority. *Dewall v. Choppin et al.*, 15 L. R. 566.

4. It is historically known that the Spanish Government never contested the validity of grants made by the French officers, before the Spaniards took possession of the colony of Louisiana in 1769. *Id.*

OPPOSITION OF THIRD PERSON.

1. The right of a third person to oppose an execution, is limited to the cases in which he owns, or has a privilege on the property seized; and in the former case, he must make out a clear title in order to arrest the sale. *Wafer v. Pratt, sheriff and another*, 1 R. R. 41.

PARENT AND CHILD.

1. The provision in the Civil Code of 1808, art. 227, page 258, forbidding the surviving husband or wife who *marries again*, from disposing of the property of any deceased child of the first marriage, but requiring it to be held and *reserved* for the other children of that marriage, is taken from the 15th law of Toro. *Verret et al. v. Theriot*, 15 L. R. 106.

2. The Spanish laws make an exception, that the surviving parent on marrying again, is not bound to *reserve* the property of his deceased child of the *first* marriage for the other children of that marriage, when it has been *acquired otherwise* than by inheritance from the deceased parent. It becomes the absolute property of the survivor, if it has been *purchased* by the deceased child, from the moment of his death. *Id.*

PARTITION.

1. In an action for a partition, a judgment in the Court of Probates fixing the rank and portion of heirs inheriting a succession, is *res judicata* when not appealed from, and no one of them can be deprived of his share in a subsequent suit. *Hook v. Hook et al.*, 14 L. R. 22.

2. A licitation made to effect a partition is not a sale *as between the heirs*, and does not change the character of the thing to be partitioned. The proceeds of real estate represent it, and are realty. *Id.*

3. If the heir reside in Louisiana, the proceeds of *real* property situated in the State, sold to effect a partition, are *real*, and will descend, according to our laws, to the heirs as real estate. *Hooke v. Hooke et al.*, 14 L. R. 22.

4. Partial and provisional distributions of property among co-heirs do not amount to a final partition, are not conclusive on those not parties, and the property in possession of the co-heirs is liable to be brought into a final partition. *Kemp v. Kemp et al.*, 15 L. R. 517.

5. The Probate Court is without authority to compel property of an estate which has been alienated by an heir, and in the possession of a third party, to be brought into partition, among all the heirs. *Id.*

6. Heirs who are of age, and parties to a provisional partition cannot complain; but minors, and co-heirs not made parties, are not concluded; and their *portions* in a final partition ought to be made up to them according to the principle of equity. *Id.*

7. Where an heir was not made a party to the proceedings, in a settlement and partition of the successions of his ancestors, he is not bound or liable under the judgment rendered, for any of the shares or balances that may be decreed against him. *Guidry v. Guidry's heirs*, 16 L. R. 157.

8. To render a partition valid and binding, all the parties to it must be cited or notified; and all the formalities prescribed by law must be pursued, to authorize a judgment of homologation, and make it binding. *Id.*

9. So, where a judgment of partition decreeing a balance due by an heir to his co-heirs, has not been regularly notified to him, and he was not made a party to the proceedings had in making the partition, he will be entitled to a perpetual injunction against such judgment. *Id.*

10. Co-proprietors of a succession of full age, and capable of contracting, may consent to a sale at public auction; and although the proceeds may be applied to the payment of debts, yet if the creditors do not interfere, such a sale may be considered in the nature of a partition, without the aid of a Court. *Bray's executrix v. Bray*, 16 L. R. 352.

11. In an action of partition the omission of some of the defendants to appeal, cannot affect the right of the others to do so. *Farrar v. Newport et al.*, 17 L. R. 346.

12. The first settlement between heirs or partners, by which a state of *indivision* is terminated, is, in substance, a partition. *Tipsett v. Jett*, 3 R. R. 313.

13. An action for the nullity or rescission of partitions, is prescribed by five years. C. C. 3507. *Id.*

P A R T N E R S H I P .

1. In an action by the heirs of a deceased brother, against the succession of the other, for wages as clerk of the latter, when the evidence preponderates to show he was a partner of his deceased brother, he will be so considered, and a recovery of wages as clerk, under these circumstances, refused. *Jenkins' heirs v. Jenkins' curators*, 13 L. R. 102.

2. Where the heirs of a deceased partner, being of age, renew the partnership with the surviving partner, and suffer the partnership property to remain during five years under his exclusive control and management, it will be presumed they were satisfied with his diligence; and they cannot claim from his executors *profits that he might have made*, on the ground of negligence or mismanagement. *Regnaud's heirs v. Peytavin's executors*, 13 L. R. 121.

3. In a universal partnership, under the Spanish law, the personal and house-hold expenses of the individual partners were chargeable to the firm, however unequal they might be in amount. *Id*

4. A contract of lease is binding on a partnership, if made verbally or in writing by *one* of the partners alone, when it appears the *firm* occupied the leased premises and carried on the business of the partnership therein. *Reynolds v. Swain et al.*, 13 L. R. 193.

5. Even in ordinary partnerships, the contract of one partner made without the authority of the other, is binding on them, if it appears the partnership was benefited thereby. *Id*.

6. The owners of steam-boats carrying freight and passengers are commercial partners; and in liquidating the partnership affairs, when some of the partners are insolvent, the other partners cannot withdraw their proportion of the proceeds of the steam-boat until the partnership debts are first paid. *Claiborne et al. v. their creditors*, 13 L. R. 279.

7. The proceeds of insurance on a lost steam-boat owned by several partners are partnership funds, and must be first applied to the payment of partnership debts, in preference to those of the individual owners or partners. *Id*.

8. An unincorporated company, or association formed of stockholders in the steamer Cuba, which appointed commissioners with authority to raise money on pledge, bottomry or mortgage, and they executed their note for five thousand dollars, on the hypothecation of the boat, which was negotiated, and the holder sued the defendant alone, as one of the stockholders: *held*, that he was liable *as such, individually*, for the amount of the note. *Vigers et al. v. Sainet*, 13 L. R. 300.

9. Stockholders in unincorporated companies are liable in the same manner as other partnerships; and partnerships, or unincorporated companies for the purchase and sale of personal property, or for carrying it for hire in ships or other vessels, are commercial

partnerships, and the stockholders are liable *in solido* for the debts of the company. *Vigers et al. v. Sainet*, 13 L. R. 300.

10. Where a commercial firm signs an attachment bond as surety, the bond is not thereby vitiated, although the partnership may not be bound; for the partner who subscribes the name of the firm is in all cases bound. *Thatcher v. Goff et al.*, 13 L. R. 360.

11. Partners in joint stock companies have no action against the company, as such, except for the settlement of accounts and partition, after the association is dissolved. *Lesseps v. Architect Company*, 13 L. R. 414.

12. If the company wrongfully confiscates or withholds the stock of a partner, he has an action to be reinstated in his rights, but his stock will remain subject to the debts and losses of the company, until its dissolution. *Id.*

13. Commercial partners may all be sued in the parish in which they conduct their business, although one of them resides and is domiciliated in a different parish. *Hobson & Co. v. Whittemore et al.*, 13 L. R. 422.

14. On the dissolution of a partnership by mutual consent, it still continues for the purpose of liquidation, and all the partners must join in a suit against any of its debtors, for the collection of debts due the firm. *Cutler v. Cochran*, 13 L. R. 482.

15. So, on a dissolution of the firm by the death of a partner, the surviving partner cannot sue without joining the representatives of the deceased one. *Id.*

16. Where an obligation is made to a commercial firm, the partners composing it must join in the action. The debt is due to the partnership *collectively*, and not to one or the other of the partners, as creditors *in solido*. *Id.*

17. An action cannot be maintained by one partner for the use of *himself* and *the other* when his authority to sue is expressly denied and not proved. *Id.*

18. In all associations or contracts, the partners or parties in interest, must be made parties to all suits instituted on the contract or association. *Allard et al. v. Orleans Navigation Company*, 14 L. R. 27.

19. So, where a portion of the share-holders of the Pontchartrain Lake Road company sued for an infringement of their contract with the defendants; *held*, that all the share-holders or parties in interest must be made parties to the suit. *Id.*

20. Partners doing business as *wood merchants, and running drays for hire*, constitute a commercial partnership, and are bound *in solido* for the obligations of the firm. *Hubbell v. Read*, 14 L. R. 243.

21. Service of citation on one partner of a particular partnership is insufficient to bring all the partners into Court. *McGehee v. McCord et al.*, 14 L. R. 362.

22. Several persons associating themselves under a particular style and firm, for the purpose of constructing a rail-road, although

they draw bills of exchange in the mercantile form, will be considered as forming an ordinary and particular partnership. *McGehee v. McCord et al.*, 14 L. R. 362.

23. Particular partnerships are joint, and the obligations of the firm bind the partners jointly only, who must be sued together, and service of citation made on each and every partner. *Id.*

24. A member of a commercial partnership may constitute the firm his attorney in fact, to endorse his name on notes payable to his order, in his absence. *Sanderson v. Oakey et al.*, 14 L. R. 373.

25. In relation to property acquired by illicit traffic, a partner stands in a different light from creditors; they claim to be paid out of the general assets of their debtor; the partner seeks for one-half of the property unlawfully acquired, and cannot be listened to. *Adams v. his creditors*, 14 L. R. 454.

26. Where there is no evidence to the contrary, the owners of a steam-boat will be deemed commercial partners, and bound *in solido* for the debts. *Shaum v. Strong*, 14 L. R. 491.

27. So, where the captain gave his due bill to the engineer of a steam boat for the balance of wages due him, the defendant, as one of the owners, was held liable for the amount of the claim. *Id.*

28. The members of a firm doing business as carpenters and signing the name of the firm to a note, are only liable, *jointly*, and not jointly and severally. *Heath et al v. Howell & Johnson*, 15 L. R. 138.

29. The members of a firm doing business as architects, and signing notes for the price of immoveable property purchased by them in the name of the firm are only bound jointly and not *in solido*. *Green v. Dakin & Dakin*, 15 L. R. 152.

30. Where partners carry on a rum distillery, and one of them, who is in the habit of buying molasses for the concern and drawing drafts on his co-partner, drew a draft for a quantity of molasses, which is delivered and used, and the co-partner refuses to accept it: *held*, that they are both liable, and bound *in solido*, nevertheless. *Pugh v. Priestly et al.*, 15 L. R. 287.

31. An association for the purpose of carrying on the cotton pressing business, is an ordinary partnership; and an acceptance by the *firm*, only binds each partner for his proportion of the debt. *McAuley v. Barnes*, 15 L. R. 427.

32. Where judgment is prayed *in solido* against the members of a firm, and one of the defendants denies his liability *in solido*, his firm being only a particular, not a commercial partnership, he must show that both partners consented to the obligation, or that it was contracted for the benefit of the firm. *Derbigny v. Mondelli et al.*, 15 L. R. 496.

33. So, where judgment is asked against the members of a firm *in solido*, and for *general relief*, and one of them denies his liability for the whole debt, on the ground that it is only a particular partnership debt, evidence of the consideration of the obligation will

be admitted, to show his liability *in solido*, the debt having been contracted for his benefit. *Derbigny v. Mondelli et al.*, 15 L. R. 496.

34. Where a concordat was made by J. E. W., one of the members of the firm of W. J. & Co., and charged with administration of the affairs of said firm, &c., of *the one part*, and the creditors of *said firm*, of the other, in which a full and entire acquittance and discharge, as well to the said J. E. W., as to the members of *said firm*, individually and jointly, of all claims, debts and demands whatsoever, is granted: *held*, that the parties of the second part acted only in the capacity of *creditors* of the *firm*, and that J. E. W. was not thereby released from an individual debt, owing to an individual creditor who was a party to the concordat. *Hodge v. Whitall*, 15 L. R. 503.

35. The surviving partner cannot sue for a partnership debt, when he has not joined the representatives of the deceased partner, or has shown no authority as liquidator of the partnership affairs. *Connelly v. Cheevers*, 16 L. R. 30.

36. In an ordinary partnership the act of one partner executing a mortgage and not in the name of the partnership, for certain slaves which had been previously purchased, is valid and binding as tending to benefit the firm. *Petrovic v. Hyde et al.*, 16 L. R. 223.

37. Where certain slaves belonging to a firm are sold and transferred by two of the partners to the third one, who receives them and stipulates to pay the price, it is a ratification of the previous mortgage and sale of the slaves to the firm by him, and he is bound. *Id.*

38. Where a partner buys out the property of the partnership, and stipulates with his co-partners to pay a certain mortgage debt, the creditor has a right to proceed directly against him by order of seizure and sale, as the principal debtor, who is personally liable and not entitled to the privilege of a third possessor, namely, the right of relinquishment. *Id.*

39. Where a note was given by one partner for an ordinary partnership debt in the name of the firm, and it is shown the defendant purchased out his co-partners, and agreed to pay all the plantation debts, he cannot resist payment, on the ground that one partner had no authority to subscribe the note sued on in the name of the firm. *Lott & Ives v. Parham*, 16 L. R. 245.

40. The owners of a steam-boat, transporting passengers and carrying merchandize for hire, are commercial partners and may be sued individually, or a portion of them, for a debt due by the boat, without joining all the parties in the action. *Black v. Savory et al.*, 17 L. R. 85.

41. After dissolution of the partnership the partners should be sued in the parish or place of their domicile; and only those residing in the same parish, can be joined. *Id.*

42. While a commercial partnership is in existence, service of citation on one of the members of the firm is good against all of them ; but after its dissolution every member, intended to be sued and made a party, must be served with citation separately. *Gaienné v. Aikin's executor et al.*, 17 L. R. 42.

43. The liquidator of a partnership has no authority to stand in judgment for the other members of the firm, unless a special power be given to that effect. *Id.*

44. So, where the partners of a commercial firm were sued after the dissolution of the partnership, and one only was cited who appeared and put in an answer for himself: *held*, that the judgment was null and void as to the other who was not separately cited. *Id.*

45. Real estate or immoveable property although purchased in the name of a firm, becomes the *joint* property of the individuals composing the firm and not partnership property liable first to the partnership debts. *Bernard, syndic, etc. v. Dufour*, 17 L. R. 596.

46. Where real estate is paid for with partnership funds, it creates an individual indebtedness of the partner to the *firm*, but the partnership does not thereby become the owner ; or confer on the creditors of the firm any right or privilege on its proceeds, in preference to individual creditors. *Id.*

47. The individual share or interest of a partner in real estate will form a fund in the hands of his syndic, liable to the claims of all his creditors without distinction. *Id.*

48. Partnership creditors are privileged over individual ones, on the partnership effects ; but the latter have not such preference over the former on the separate and individual property surrendered by the insolvent member of a firm. *Id.*

49. The liquidating partner of a firm has no right to dispose of and control the undivided interest of the other partner in real property owned jointly. *Id.*

50. The purchase of house-hold furniture for the use of one of the partners, although occasionally used to entertain the customers of the firm, cannot come within the scope of the partnership. *Gray v. Tiernan, Cuddy, & Co.*, 18 L. R. 53.

51. A partnership is not bound for a note signed by one of the partners with the partnership name, and which is shown to have been given for the price of furniture for his individual use. *Id.*

52. After the dissolution of a partnership neither of the partners can bind the other or the firm without special authority derived from a new contract between them. Such a contract is essentially one of mandate. *Fisk, Watt & Co. v. Mead*, 18 L. R. 332.

53. So, where a partner drew a bill of exchange, in the name of a firm, which had been dissolved, on one of the partners, and waived acceptance and presentation to the drawee: *held*, that the latter is not bound, or in any way liable for the payment of said draft. *Id.*

54. When the articles do not contain a clause that the partnership might be dissolved at the will of one of the parties, simply by

withdrawing from it, and the other refuses to consent, it becomes necessary for the complaining partner to apply to the Court for a dissolution. *Bruce v. Ross et al.*, 18 L. R. 341.

55. But in case of violation of any of the articles of partnership by one partner, the other may dissolve the partnership, even without a stipulation to that effect. *Id.*

56. Where a partnership has been properly dissolved by the judgment of the inferior Court, and a liquidation ordered, it will be carried into effect by this Court. *Id.*

57. Where a partner accepts a draft in the name of the firm, but which is for his individual benefit, or payment, the other partner may be subrogated to the creditor's rights and recover the amount from his co-partner. *Hall v. Gaienné et al.*, 18 L. R. 442.

58. It is the general and settled jurisprudence, that on the dissolution of a partnership, all debts due by it, must first be paid, before there is a division among the partners; the fund remains a common stock and pledged for the payment of the debts of the firm, *Claiborne & Mather v. their creditors*, 18 L. R. 501.

59. The partnership in a steam-boat is dissolved by the destruction of the boat which was the object of the contract of partnership; and the insurance money arising from the loss of the boat becomes a fund out of which all the creditors of the partnership must be first paid. *Id.*

60. Creditors have a right of preference or privilege on the partnership fund to be first paid; and no partner can assign his share, until the debts of the firm are paid. *Id.*

61. So, where two persons make a surrender of the partnership affairs with their own, the third partner who is solvent, cannot take out or assign his share of the partnership funds until the partnership debts are paid. *Id.*

62. The balance of the credit of a partner on his individual account, over and above the debt, should belong to him exclusively, and not one-half to the other partner. *Burton v. Maltby*, 18 L. R. 531.

63. Where a witness swears that what is written in a certain document is correct, it does not imply that it *contains a full statement*, of all the affairs of the partnership; as he does not swear that it contains every thing relating to the partnership affairs. *Id.*

64. Where a party has made himself liable to creditors by dealing with the firm, although not a partner, and has been compelled to pay a partnership debt to a creditor, he will recover it back from the firm. *Flower v. Millaudon*, 19 L. R. 185.

65. All the partners in a commercial firm must join in an action or obligation due to the partnership; and on the dissolution of the partnership by the death of one of the partners, the surviving ones must join the representatives of the deceased, or obtain authority from the proper tribunal, before they can sue for a partnership debt. *Hyde et al. v. Brashear*, 19 L. R. 402.

66. The incapacity of surviving partners to sue without obtaining authority or joining the representatives of the deceased, need not be specially denied. It may be assigned for error. *Hyde et al. v. Brashear*, 19 L. R. 402.

67. The representatives of the deceased partner must be joined, or authority from the Court of Probates obtained, in a suit by the surviving partners, due the partnership. *Babcock, Gardiner & Co. v. Brashear*, 19 L. R. 404.

68. Surviving partners cannot sue alone for a partnership debt. The representatives of the deceased partner must join in the suit. *Dick and others v. Dunlap*, 1. R. R. 54.

69. Ordinary partners are not bound *in solido* for the debts of the partnership; nor can one partner bind the others unless authorised to do so, either specially, or by the articles of the partnership itself, or unless it be proved that the partnership was benefited by the transaction, and the burden of proof rests on the party who seeks to be paid. *Dumartrait, administrator and others v. Gay and another*, 1 R. R. 62.

70. A retiring partner is not responsible for goods delivered after the dissolution of the firm, nor will he be bound by any acknowledgements in regard to them made by his former partner. *Clarke v. Jones and another*, 1 R. R. 78.

71. Where the endorsers of a note, who were partners at the time of endorsement, have been discharged by want of legal demand, a subsequent promise to pay, made by one of them, after the dissolution of the firm, will not be binding on the other. *Hart and others v. Long and another*, 1 R. R. 83.

72. A provision in articles of co-partnership, that all disputes growing out of the partnership transactions shall be submitted to arbitration, does not apply to an action instituted after the dissolution of the partnership by the death of one of the members, for a final settlement of the partnership affairs. *Gallier v. Walsh and another*, 1 R. R. 226.

73. An action for a final settlement of the partnership affairs, against a surviving partner and the curator of the estate of a deceased partner, in which the petition sets forth acts of mismanagement and fraud, is not a claim for a sum of money in the meaning of art. 924 of the Code of Practice, and as such exclusively within the jurisdiction of the Court of Probates. Such an action is properly brought before a Court of ordinary jurisdiction, in which a jury, if called for, may pronounce on the question of fraud. *Id.*

74. A surviving partner will not, by consenting to the appointment of experts by a Court of Probates to examine the partnership books after the death of his co-partner, so subject himself to its authority as to preclude his right to except to its jurisdiction. *Id.*

75. One partner cannot sue another for particular sums paid on account of the concern; the action must be for a final settlement

of the partnership, and for the balance due after such liquidation. *Jeaudron and husband v. Boudraux, tutor, etc.*, 1 R. R. 383.

76. Where a partnership has been dissolved by the death of one of the members, an action may be maintained by the survivors, and the legal representatives of the deceased. *McCord and others v. West Feliciana Rail-Road Company*, 1 R. R. 519.

77. In an action by the survivors, and the curator of the succession of a deceased partner, the death of the curator *pendente lite*, is no cause for dismissing the suit. The action may be prosecuted by the heirs, or other legal representatives of the deceased partner. *Id.*

78. An entry in the books of a partnership, made at the time of the transaction, will be conclusive between the parties, unless shown to be erroneous. The partners were the mutual agents of each other, and such an entry must be regarded as an account rendered of the transaction. *Armistead and another v. Spring*, 1 R. R. 567. *Jarvis and others v. Armistead and another*, 1 R. R. 567.

79. Defendant sold to one of the plaintiffs his interest in a partnership, the latter taking his place in the house, and assuming the partnership debts, but not the private debts of either of the partners. In an action by the new house, against the retiring partner for the amount of his private account with the old firm. *Held*, that the new partner taking the place of his vendor, can have no greater rights than the latter; that each of the original partners having a private account with the firm, the one necessarily extinguished the other *pro tanto*, and that the difference between the two, forms a balance due from one partner to the other, to be adjusted on the final settlement of the concern; and that, by the effect of the sale, the private account of the retiring partner, became that of his successor. *Id.*

80. Under article 2796 of the Civil Code, which in this respect has altered the general commercial law, the joint owners of a ship or other vessel, are, in all transactions relative to the use of such vessel or for the objects of the association, as to third persons, commercial partners and responsible as such *in solido*. *Banchor v. Bell*, 2 R. R. 182.

81. Each of the joint owners of a steamer, or other vessel, holds an undivided share, which he may dispose of without consulting the others; but neither can sell the interest of a co-proprietor without his consent. *Byrne v. Hooper*, 2 R. R. 229.

82. Where the joint owners of a steamer employ her in carrying merchandize for freight, they become *quoad hoc*, commercial partners, and are liable, *in solido*, to third persons, for all debts incurred in prosecuting the business; but the boat does not thereby cease to be the property of the joint owners, and become partnership property. The manner of employing the boat does not change the title by which it is held. It will continue to be the individual property of each of the owners. *Id.*

83. Where a judgment has been obtained against the joint owners of a steamer, a waiver by one of the formalities required by law for the sale of the property, will not be binding on the rest. *Byrne v. Hooper*, 2 R. R. 229.

84. The members of a commercial partnership have each the right to represent the firm. Service of citation on either, or admissions by either, will be binding on the rest. But where it is attempted to satisfy a judgment against the partnership out of the individual property of a member, he alone can waive the formalities required by law for its alienation. In such a case, a partner has no more authority than a stranger. *Id.*

85. No action will lie against a partnership, for money lent to one of the partners in his own name, to be put by him into the partnership as his share of the capital, and to be repaid to the lender out of his portion of the profits of the business. The right of action exists only against the borrower, and not against the partnership, with which the lender never contracted. *Smith v. Sénécal*, 2 R. R. 453.

86. No action can be maintained by a partner against the firm, to withdraw his portion of the capital, before the expiration of the term for which the partnership was to exist. *Id.*

87. Partnership funds must be applied to the payment of the partnership debts, in preference to debts due by a partner individually. *Id.*

88. Where a name has been used by a partnership for the purpose of a fictitious credit, with the consent of the partner *in commendam*, the latter cannot avail himself of the provisions of art. 2821 of the Civil Code, to withdraw the amount advanced by him, or to free himself from responsibility either to his partner or third persons. *Jonau v. Blanchard*, 2 R. R. 513.

89. The father and natural tutor having advanced the capital for a minor child, not yet emancipated, constituted her, by notarial act, a partner *in commendam*. *Held*, that the authorization to enter into the partnership, having been given by notarial act, was equivalent to an emancipation; that the father clearly intended to give her the necessary authorization to enter into the partnership; and that whatever words may be used, effect will be given to the intention of the father, if expressed in an act clothed with necessary solemnities. *Id.*

90. An emancipated minor may engage in trade, and he will be bound by his commercial engagements as a person of full age. C. C. 379, 1867, 2222. He may form a general partnership, as well as one *in commendam*. *Id.*

91. The ratification by a husband of a contract of partnership entered into by his wife, an unemancipated minor, before marriage, will be binding on the latter, he being by law the administrator of her dower. C. C. 2327, 2329, 2330, 2334. *Id.*

92. The dissolution of a partnership is not an act of adminis-

tration, and, therefore, requires a special power. It does not come within the general powers of an agent. C. C. 2966. *Jonau v. Blanchard*, 2 R. R. 513.

93. A partnership is dissolved by the death of one of the partners; and the property must be divided as soon as practicable, unless there be some stipulation to the contrary. *Mathison v. Field*, 3 R. R. 44.

94. The representative of a deceased partner may take the necessary measures to protect the interest of the partner he represents; but he cannot administer the partnership affairs, unless authorised to do so by the contract of partnership. *Id.*

95. Petition by the syndics of an insolvent for a division of partnership property by sale. Four experts having been appointed, by consent, to report whether the property could be divided in kind, without loss or inconvenience, and two only having reported, on motion of plaintiffs the order appointing experts was rescinded, and the Court proceeded to receive other evidence of the facts intended to be established by their report. *Held*, that the reports of the experts was not the only mode of proof to which the Court might resort, to enable it to decide whether the property should be sold; and that, under art. 1261 of the Civil Code, any other legal evidence might be received. *Kohn v. Marsh*, 3 R. R. 48.

96. Where in an action for the settlement of a partnership, the property is such as cannot be divided in kind without loss or inconvenience, a sale may be ordered at once, without waiting for the settlement of the partnership accounts. *Id.*

97. A partnership formed for the purpose of purchasing timber, sawing it, and selling it for a profit, is, under art. 2796 of the Civil Code, a commercial one. *succession of Hamblin*, 3 R. R. 130.

98. Where real property is purchased by a commercial firm, the members of the firm become joint owners thereof; and it cannot be alienated by one partner, without the consent of the rest. C. C. 2796. But where the latter, by receiving a portion of the price, subsequently ratify a sale by the former, they will be estopped from asserting any title to the prejudice of a *bona fide* purchaser. *Thomas v. Scott*, 3 R. R. 256.

99. Partners cannot plead ignorance of the transactions of their house. *Id.*

100. Though the legal title to real property bought by a commercial firm, be in the members individually, each holding an undivided share, the value thereof belongs to the partnership; and a partner, after disposing of his interest therein, cannot avail himself of his legal title to sue for a partition. *Id.*

101. The property of a partnership is common, held *pro indiviso* by all the partners, responsible for the debts of the concern, and subject, after their payment, to division among the partners, according to their agreement. Each is a debtor for what he promises to bring in; and if one have brought in more than the rest, he is a

creditor of the partnership for the difference, and, as between the partners, has a right of retention on the common stock for its repayment, and for any debt of the partnership for which he may be made responsible. *Millaudon v. New-Orleans and Carrollton Rail Road Co.*, 3 R. R. 488.

PAYMENT.

1. Where the payment of the second, instead of the first note, is made in error, the mistake may be proved or shown by witnesses, and the error corrected, without affecting the liability of any of the parties to the note. *Union Bank v. Slidel*, 15 L. R. 314.

2. The payment being made in error, did not extinguish the obligation evidenced by the note, nor the mortgage which was its accessory. *Id.*

3. Where a creditor gives a receipt at the foot of an account, in which he has a privilege for personal property sold, stating he has *received payment by note payable at four months*, it is a payment of the account and extinguishes the privilege. *Walton & Son v. Bemiss et al.*, 16 L. R. 140.

4. So, where a creditor receives a note from his debtor, to collect and pay himself, he is bound to use due and proper diligence to collect it, or he will be charged with the amount. *Dwight & Hartman v. Bemiss et al.*, 16 L. R. 145.

5. Where it is expressed in the act of sale, that notes were *received in payment*, this expression will be taken in reference to other parts of the act, where it is shown a mortgage was retained, &c. In such cases it is not such a payment as will prevent a rescission of the sale in case of the non-payment of the notes. *Borgeat v. Smith's syndic*, 16 L. R. 467.

6. To prove the extinguishment of the debt, claimed in the suit, such payment must be specially pleaded. *Landry v. Baugnon*, 17 L. R. 82.

7. The plea of payment relates particularly to transactions between plaintiff and defendant, and exclusively to sums paid the latter in discharge or in part payment of the plaintiff's demand. *Davis v. Davis's syndic*, 17 L. R. 259.

8. Under the plea of the general issue, the defendant has a right to show that the plaintiff has no claim, or a less one than he sets up, or show money legally expended for plaintiff's benefit, education, &c.; and in general every payment may be proved, made to any person, except the plaintiff, which tends to lessen or destroy his demand. *Id.*

9. Payment made to the payee by the drawee of a bill of exchange, which is pledged to him, evidenced by a receipt written

over the payee's endorsement, before the bill was due, when it is shown the property of the bill was in another and liable to his creditors, *is bad* and will not avail against the claims of the creditors of the owner. *Sewall v. McNeil et al.* 17 L. R. 185.

10. The payment by the clerk of a Court in which money is deposited, to the attorney of the party entitled to receive it, is a good payment and will discharge the clerk from all liability. *Mayor et al. v. Hennen*, 18 L. R. 428.

11. The resignation and subsequent failure of one of the plaintiffs in a judgment, who was sheriff, furnish no excuse for the defendant to withhold payment to his successor in office. *State v. Judge of District Court*, 18 L. R. 542.

12. Compensation and payment must be specially pleaded to enable the defendant to make proof of either. *McKown v. Mathes*, 19 L. R. 542.

13. But an amendment setting up the plea of payment and compensation, comes too late after the trial commences and jury are sworn. *Id.*

14. A receipt of full payment by the original *payee* to the maker of a note, offered against the holder, will be disregarded when shown to be collusive, and when it is contradicted by other evidence. *Bienvenu v. Segura*, 19 L. R. 346.

15. Where the creditor does not suspend his execution so as to put it out of his power, or the surety (*if he pays*) to pursue the debtor, it is no prolongation of the time of payment. *Woodburn v. Friend et al.*, 19 L. R. 496.

16. Where there has been no express imputation, a payment must be imputed to the most onerous debt. *Denis v. Ramouin*, 1 R. R. 318.

17. A debt contracted as surety for another is not necessarily less onerous than one due as principal; and where there has been no express imputation, a payment is not necessarily to be imputed to a debt due in the latter capacity, rather than to one due in the former. Whether a debt be more or less onerous, depends on the interest the debtor has in discharging it. *Id.*

18. A note, though made payable in dimes, may be discharged by a payment in any other legal coin of the United States. *Commissioners of the Atchafalaya Rail Road and Banking Co. v. Bean*, 3 R. R. 414.

19. An agreement by an attorney at law, to receive payment of a judgment in any thing but the legal currency of the United States, will not be binding on the plaintiff. *Dunbar v. Morris*, 3 R. R. 278.

20. The holder of an accepted draft for a sum payable in the notes of a particular Bank protested at maturity, will be entitled to recover the value of the notes at the date of the protest. A subsequent tender of the amount in the notes of the Bank, they having depreciated in the mean time, will not entitle the defendant to settle

the debt at the value of the notes at the date of the tender. *Meeks v. Davis*, 3 R. R. 326.

21. A payment cannot be imputed to the reduction of the principal, where any interest is due. C. C. 2160. *Shaw v. Oakey*, 3 R. R. 361.

PLEADING.

1. The character of the action, whether petitory or possessory, is not determined by the allegations of the petition alone, but by the prayer of the petition and the allegations. *Hood v. Segrest*, 1 R. R. 109.

2. Where the petition alleges that plaintiff had both the property and the possession of certain slaves, and concludes with a prayer that the defendant be condemned to deliver up *the possession*, the prayer makes the action a possessory one; had the latter been for *the recovery* of the slaves, the action would have been a petitory one. So where the petition avers that the plaintiff owned, and had possessed as owner certain slaves, and prays that he may have *judgment for them*, the action will be a petitory one. *Id.*

3. The prayer of a petition determines the character of the action. *Carraby v. Lebreton*, 1 R. R. 242.

4. Where the petition makes it necessary to inquire into the title of the plaintiff, and to determine its validity, the action is a petitory one; and he must make out his title before the defendant can be disturbed. *Id.*

5. The plaintiff in a petitory action, must show a good and legal title in himself. *Hart and others v. Foley*, 1 R. R. 378. *Winchester v. Cain and another*, 1 R. R. 421.

6. A defendant sought to be evicted by a petitory action, may urge, by way of exception to the title of plaintiff, any thing that he could plead in a direct action of nullity. *Hart and others v. Foley*, 1 R. R. 378.

7. The proceeding under the 13th section of the act of the 20th of March, 1839, authorising a plaintiff to propound interrogatories to third persons touching any property in their possession belonging to the defendant, or any debt which they may owe to the latter, was intended to enable the plaintiff to get at property belonging to the defendant, in the possession of third persons; but it can not be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in the possession of such third persons. The latter cannot be deprived, by such a proceeding, of any advantage, or means of defence they would have in a direct action against them. *Laville v. Hebrard*, 1 R. R. 435.

8. In a suit by the holder against the drawer of a promissory

note, negotiated after maturity, which had been given on the settlement of a partnership formerly existing between the drawer, the payee and a third person, the defendant may be relieved by showing error in the settlement, without making his partners parties to the suit. *Ford v. Dosson*, 1 R. R. 39.

9. Surviving partners cannot sue alone for a partnership debt. The representatives of the deceased partner must join in the suit. *Dick and others v. Dunlap*, 1 R. R. 54.

10. A creditor who wishes to hold the heirs of the wife responsible for a community debt, must join them in his suit against the husband for the latter no longer represents the community. *Hart and others v. Foley*, 1 R. R. 378.

11. An action can only be brought by one having a real and actual interest. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

12. Where the record shows that all the persons who entered into the original contract with the defendants, are plaintiffs, it will be no objection, that others, who became subsequently interested in the contract, without the privity of the defendants, are not made parties to the suit. *McCord and others v. West Feliciana Railroad Company*, 1 R. R. 519.

13. Where a partnership has been dissolved by the death of one of the members, an action may be maintained by the survivors, and the legal representatives of the deceased. *Id.*

14. In an action by the survivors and the curator of the succession of a deceased partner, the death of the curator *pendente lite*, is no cause for dismissing the suit. The action may be prosecuted by the heirs, or other legal representatives of the deceased partner. *Id.*

15. Both the debtor and his vendee must be made parties to an action to annul a sale, alleged to have been made in fraud of the rights of the plaintiff as a privileged creditor. *Potier v. Harman and another*, 1 R. R. 525.

16. A conveyance of slaves, in an other State, to a trustee for the use of the owner during her life, and for the purpose of being emancipated afterwards, vests a legal title in the trustee, who may sue in this State to enforce the trust. *Jordan v. Black*, 1 R. R. 575.

17. Where there is no evidence that defendant had more than one domicil, it is unnecessary to state in the sheriff's return, that service of petition was made at his usual domicil. *Griffing, administratrix v. Caldwell and others*, 1 R. R. 15.

18. It is not necessary that it should appear from the sheriff's return, that the copy of the petition served on the defendant was sealed with the seal of the Court, and certified by the clerk to be a true copy. *Id.*

19. In an action against a party for the proceeds, of certain *floats*, or pre-emption rights of settlers on the public lands, sold by him as agent for the plaintiff, the name of the settler, as well as the range, township, and section of the public land, on which the

settlements were made, should be stated. *Pipes v. Garrett, administrator*, 1 R. R. 19.

20. Service of citation must be accompanied with that of a copy of the petition; the latter is the only document from which the defendant can ascertain the demand with which he is required to comply. *Harris, for the use, etc., v. Alexander, and another*, 1 R. R. 30.

21. Service of a copy of the petition must appear of record; no other evidence than the sheriff's return can be received to prove it. It may be waived by the appearance of the party. *Id.*

22. A petition may be amended so as to change the action from a possessory to a petitory one. *Hoover, tutor v. Richards and wife*, 1 R. R. 34.

23. An affidavit that the *allegations* in the petition are true, is a sufficient compliance with a law which requires that the *facts* stated in the petition shall be sworn to. *Stanbrough v. Scott, sheriff, and another*, 1 R. R. 43.

24. On an application for an injunction from the District Court in the absence of the judge, the petition must be addressed to the judge of that Court, and not to the Parish Judge, though the latter be applied to, under the act of 1835, to grant it. *Wadsworth v. Harris and another*, 1 R. R. 96.

25. A supplemental petition containing no new allegations, and filed for the sole purpose of propounding interrogatories, to which the defendant has neglected to answer after sufficient time, may be withdrawn, by leave of the Court, after the case has been called for trial. *Mackin and others v. Rowley*, 1 R. R. 82.

26. Where a petition has been addressed, by mistake, to a tribunal different from that in which it was filed, the error will be fatal; no judgment by default can be taken, nor can permission be given to amend. *Wadsworth v. Harris and another*, 1 R. R. 96.

27. In an action of a policy of insurance, an allegation in the petition that the defendants were legally put in default will be sufficient, without expressly alleging a compliance in detail with the provisions of the policy, where such compliance is proved on the trial. *Mason v. the Louisiana Marine and Fire Insurance Company*, 1 R. R. 192.

28. An affidavit, annexed to a petition, by a party, that the facts are true to the best of his knowledge and belief, is as positive in point of law, as if the words to the best of his knowledge and belief had been omitted. *Jewell and others v. Jewell and others*, 1 R. R. 316.

29. An affidavit should be so positive, that the party may be convicted of perjury in case of his swearing falsely. *Id.*

30. In an action on a contract, the original of which has been lost, it will be sufficient to allege the loss, and to state its contents, in the petition; proof of the loss need not be offered previous to the trial. *Townsend and another v. Caldwell*, 1 R. R. 433.

31. A variance as to the name of the defendant between the petition and the note sued on, is immaterial, where the note is attached to the petition. *Tenney v. Russell and others*, 1 R. R. 449.

32. Where the petition claims interest only at five per cent, but refers to the note annexed to it which bears interest at ten per cent, and prays for general relief, the error may be corrected by reference to the note, and judgment be given for interest at the latter rate. *Leverick and another v. Walden*, 1 R. R. 469.

33. The cause of action must, in all cases, be stated with sufficient certainty, to prevent a repetition, when once investigated and decided. *Hatch v. City Bank of New-Orleans*, 1 R. R. 470.

34. Suit on a contract entered into by certain individuals, the petition setting forth their names, and reciting that, under the firm of *Isaac McCord and company*, they had undertaken to execute certain work. In articles of partnership, entered into for the purpose of executing the work, subsequently to the contract, it is provided that the name of the firm shall be *McCord and company*. Held, that the variance between the name of the firm as recited in the petition, and as set forth in the articles of agreement, is immaterial. *McCord and others v. West Feliciana Rail Road Company*, 1 R. R. 519.

35. Where, in an action on sundry Bank notes, they are described by their numbers and letters, and by the names of the president and cashier, who signed them, and are annexed to the petition though not made a part of it, the description will be sufficient. *Gray v. Commercial Bank of New-Orleans*, 1 R. R. 533.

36. Notes annexed to a petition cannot be withdrawn, without leaving copies which will form part of the record. *Id.*

37. An applicant for the curatorship of a succession, is not bound to state in his petition to the Court of Probates, the grounds on which he claims the appointment, as the first applicant is entitled to to curatorship, unless legally opposed. In case of opposition, he may show, in a supplemental petition, the grounds of his claim. *Succession of Pollet*, 1 R. R. 559.

38. Where a dilatory exception has been filed before a judgment by default, it must be noticed, though followed on the same sheet of paper by an answer to the merits. The last clause of the 23d. section of the act of 20th March, 1839, only prevents the filing of such exceptions after the judgment by default. *Segrest, administratrix v. Hood. Re-hearing*, 1 R. R. 108.

39. A motion requiring plaintiff to state more clearly his cause of action, is too late after an answer to the merits. *Marr and others v. Barnes*, 1 R. R. 190.

40. A defendant, sought to be evicted by a petitory action, may urge, by way of exception to the title of plaintiff, any thing that he could plead on a direct action of nullity. *Hart and others v. Foley*, 1 R. R. 378.

41. A claim which a party has failed to establish in a direct ac-

tion, cannot be set up by way of exception in another. *Armistead and another v. Spring*, 1 R. R. 567. *Jarvis and another v. Armistead and others*, 1 R. R. 567.

42. Non-payment of the costs of a suit, for the same cause of action previously discontinued is not sufficient ground for a dismissal; but will justify the defendant in delaying to answer until paid. The exception is a delatory one. It is not necessary that such costs should have been paid in money; it will be sufficient, if the officers, to whom they were due, acknowledge that they have been satisfied, as the defendant will be thereby discharged from any liability from them. *Jordan v. Black*, 1 R. R. 575.

43. The answer cannot be amended after the case has been called for trial. *Duval v. Kellam*, 2 R. R. 58.

44. A jury may be prayed for in a supplemental answer; but it will be in the discretion of the Court to permit such answer to be filed. It will be properly rejected where the jurors summoned for the term have been discharged, and allowing a jury would delay the trial a whole term. *Hooper v. Hyams, executor*, 1 R. R. 90.

45. An answer, changing the issue, offered to be filed after the case has been fixed for trial, will not be received. *Landry v. Gamet*, 1 R. R. 362.

46. Where a defendant is cited to answer within a certain number of days, he is entitled to the whole of the last day to file his answer. *Fowler v. Smith and husband*, 1 R. R. 448.

47. A supplemental answer, filed without leave of the Court, or of the plaintiff, will be disregarded. *Callaway v. Webster*, 1 R. R. 553.

48. One sued as security on the promissory note of an insolvent, may plead in compensation and reconvention a sum of money due to the principal debtor, in the hands of plaintiff, for which the latter had given no consideration; and interest will be allowed on it from the date of the judgment. *Bronaugh v. Neal*, 1 R. R. 23.

49. A defendant will not be allowed to amend his answer for the purpose of citing third persons in warranty, who he alleges have placed the slave sued for in his possession, when he does not pretend to have any recourse, nor asks for any judgment against them. *Cawthorn v. W. N. T. McDonald*, 1 R. R. 55.

50. The purchaser of a slave who has given his note for the price, and afterwards sold to a third person who binds himself to pay the note due to the original vendor, when sued by the latter, will be entitled to a delay to cite such third person in warranty. *McClure; and another, executors v. Copley and another*, 1 R. R. 133.

51. A judicial avowal or admission by an ancestor is as binding on his heirs, as it was on himself. *Boatner v. Scott*, 1 R. R. 546.

52. An admission made in the course of judicial proceedings, cannot be retracted to the prejudice of the adverse party. *Id.*

53. Where the accounts of an executor have been homologated, he can no longer be held responsible for payments made by him

under the orders of the Court of Probates. Should the heir discover that payments have been made which were not due, his recourse, if he have any, is by an action *condictio indebiti*, against the party who has received what he was not entitled to; and where such payments have been made to the executor for commissions alleged to have been illegally allowed, an action to recover them may be brought against him, individually, before a Court of ordinary jurisdiction. The defendant is no longer executor, nor is he sued as such. *Baldwin v. Carleton*, 2 R. R. 54.

54. A direct action is not necessary to establish the falsehood of a notarial act; it may be shown collaterally. *De Blanc v. Martin*, 2 R. R. 82.

55. The proceeding under section 13 of the act of 20th March, 1839, authorising a plaintiff to propound interrogatories to third persons, touching any property in their possession belonging to the defendant, or any debt which they may owe to the latter, cannot be used as a substitute for a direct revocatory action, the object of which is to test the validity of titles to property in the possession of such third persons. The latter cannot be deprived, by such a proceeding, of any advantage or means of defence they would have in a direct action against them. *Taylor v. Whittemore*, 2 R. R. 99.

56. Simulated or fraudulent sales cannot be inquired into, by commencing by seizure and treating them as nullities. *Le Gooster v. Barthe*, 2 R. R. 388.

57. Plaintiff claiming certain lots of ground, obtained an injunction to prevent the syndic from selling them as the property of the insolvent and prayed for its perpetuation, and for a judgment upon his title. The syndic having answered, plaintiff filed a supplemental petition, alleging that the sale, under which the insolvent set up title to the property, was simulated. On an exception that the supplemental petition tended to charge the issue: *held*, that the action was originally petitory, and the supplemental petition correctly admitted. *Id.*

58. A married woman, separated from bed and board, may sue under the laws of this State, without the authorization of her husband or a Court. Proof of the existence of the judgment of separation, is all that is requisite to establish her authority. C. C. 125, 2410. Act of 1 April 1826, § 2. *Bonneau v. Poydras*, 2 R. R. 1.

59. Where an action had been commenced by a married woman, without the authority of her husband or of the Court, who two days after obtained a judgment of separation from bed and board, on an exception to her right to sue: *held*, that the exception should be overruled, as it would have been useless to dismiss a suit which might be commenced immediately afterwards, her disability having been removed. *Baldwin v. Union Insurance Company*, 2 R. R. 133.

60. The rights of a creditor claiming a privilege on property in the hands of a judicial sequestrator, cannot be determined without

making such creditor a party to the suit. The judicial sequestrator, does not represent him. *Bank of Alabama v. Hozey*, 2 R. R. 150.

61. Though the creditors of an estate, the property of which has been sold by order of Court to pay their claims, are not technically, warrantors of the purchaser, yet as their obligation to repay the price distributed among them depends on the eviction of the latter, their situation is analogous to that of a vendor, and they should be made parties to the action against the purchaser. The latter cannot be compelled to bring as many actions, in their different Parishes, as there may be creditors liable to refund. *Rivas v. Hunstock*, 2 R. R. 187.

62. A widow, residing in France, may oppose, in the Courts of this State, the homologation of the will of her husband and stand in judgment for her child. *Succession of Senac*, 2 R. R. 258.

63. An exception that the claim is a joint one against several persons, some of whom have not been made parties, is too late after the case has been remanded for a new trial. It should have been pleaded before issue joined. C. C. 333. *Rothschild v. Bowers*, 2 R. R. 380.

64. Articles 91 and 156 of the Code of Practice, which provide, that if, in order to give jurisdiction to the Court, one demand less than is really due, and do not amend his petition and augment the demand, he shall be presumed to have remitted the surplus, relate to the reduction of an entire sum, as where the claim exceeds the jurisdiction of the Court, and is reduced so as to bring it within it. But where an amount is payable in instalments, as rent at fixed periods, a conjunctive obligation is created, and each instalment may be paid or enforced separately. So, where four monthly instalments of rent are due, a suit for the last month, will not release the lessee from the obligation to pay the rent due for preceding months. *Brandagee v. Chamberlin*, 2 R. R. 207.

65. Where the petition prays for the rescission of a contract of sale or exchange, the plaintiff cannot be allowed either the price, or the value of the thing sold or exchanged. Restitution of the thing itself can alone be decreed. *Menefee v. Johnson*, 2 R. R. 274.

66. Plaintiff cannot amend his petition so as to change his claim for the price of certain slaves, into an action for damages for defendant's failure to give them up in compliance with his contract. *Id.* C. P. 419.

67. A prayer for a jury is too late after the case has been set for trial. C. P. 494. 495. *Id.*

68. Every thing must be stated in the petition which it is necessary for the defendant to know in order to put him on his defence. *Cox v. Robinson*, 2 R. R. 313.

69. The allegation in the petition, in an action against the principal and sureties on an attachment bond, that plaintiff has sustained damages, by the wrongful attachment, seizure, and detention of

the slaves attached, whereby he has been deprived of his property, and of the services and wages of the slaves, accompanied with a prayer for the amount of such damages, and for general relief, will not support a verdict for the value of the slaves. *Cox v. Robinson*, 2 R. R. 313.

70. The demand to be made on a note payable at a particular place, cannot be assimilated to the amicable demand required by the Code of Practice. The want of the latter must be pleaded to put the plaintiff on the proof of it, and a failure to establish it does not prevent his obtaining judgment, but only subjects him to the payment of the costs incurred before the appearance of the defendant. The former must be alleged and proved, or the plaintiff cannot recover. *Stillwell v. Bobb*, 2 R. R. 327.

71. Putting the defendant *in morâ*, is a condition precedent to the recovery of damages for a passive violation of a contract. Such damages are only due after the debtor has been put in default, and the default must be alleged and proved; nor can evidence be received to prove a demand, where it has not been alleged in the petition. *McMaster v. Brander*, 2 R. R. 498.

72. Where in an action for damages for the non-delivery of goods, the petition contained no allegation of an amicable demand, but defendants averred, in their answer, a tender of the goods made by them subsequently to the commencement of the suit: *held*, that the tender having been made subsequently to the filing of the petition, cannot cure the omission of an allegation of a previous demand, and give the plaintiffs a right of action. *Id.*

73. Where in an action by a married woman, defendant excepts on the ground that plaintiff was not authorised by her husband or by a Court, the only effect of the exception, if sustained, is to require the plaintiff to exhibit her authorization before proceeding further with the case. It is immaterial at what time such authority may be obtained and produced, provided it be before the trial of the case on its merits. C. P. 320, 321. *Bonneau v. Poydras*, 2 R. R. 1.

74. Cases of *Wetmore & Co. v. Merrifield*, 17 Louisiana 513, and *Booraem v. Merrifield*, *id.* 594, overruled, so far as they go to establish that in an action against the drawer of a bill, or maker of a note payable at a particular place, proof of a demand at such place is not necessary, where want of amicable demand has not been pleaded. *Stillwell v. Bobb*, 2 R. R. 327.

75. Damage occasioned by the institution of the suit, cannot be pleaded in reconvention. Where defendant has been injured, the remedy is by an action on the bond. *First Municipality of New-Orleans v. Orleans Theatre Company*, 2 R. R. 209.

76. A balance due on an unsettled account cannot be pleaded in compensation to an action on a promissory note; nor in reconvention, when unconnected with the plaintiff's claim. It must be sued for in a direct action. *Jonau v. Ferrand*, 2 R. R. 216.

77. Pleas in reconvention must be set forth with the same certainty as to amounts, dates, &c., as if the party opposing them were plaintiff in a direct action. *Jonan v. Ferrand*, 2 R. R. 216.

78. Action for a balance due on a contract by which plaintiffs undertook to construct a rail-way, the defendants, the other contracting party, agreeing to supply the lumber, and for damages for loss sustained by plaintiffs in consequence of defendants' failure to furnish the lumber. Plea in reconvention that plaintiffs had, by a subsequent contract, bound themselves to furnish the lumber. *Held*, that though different from the main action the demand in reconvention was incidental to the claim for damages, within the meaning of articles 374, 375, of the Code of Practice. *Langfitt v. Clinton and Port Hudson Rail-Road Company*, 2 R. R. 217.

79. In an action on a joint contract, the individual debt of one joint contractor may be pleaded in compensation of his share in the joint contract. *Id.*

80. In an action for slander of title, defendants who had reconvened by asserting title under a contract with plaintiff, and prayed that he might be condemned to execute a conveyance to them and to give security, as well as for damages on the second day of the trial, but before plaintiff had concluded his evidence, moved to discontinue: *held*, that they were entitled to discontinue the whole plea in reconvention, including the claim of title. *Walden v. Peters*, 2 R. R. 331.

81. In an action against the purchaser of property sold under a *fiери facias*, the parties to the original suit may be cited in warranty. Having received the purchase money, if the consideration of the sale fail by the eviction of the purchaser, they will be bound to refund; and their liability must be regulated by articles 2599 of the Civil Code and 711 of the Code of Practice. *Rivas v. Hunstock*, 2 R. R. 187.

82. The omission by a purchaser, to notify his vendor or those who are responsible to him, in case of eviction, of the action instituted against him, will not, under articles 2494 of the Civil Code, and 388 of the Code of Practice, release the latter, unless they can show that they had means to defeat the action, which were not used owing to their not having been cited in warranty, or apprized of the institution of the suit. By the word *means* in art. 2494 of the Civil Code, must be understood new facts, or peremptory exceptions, which if presented to the Court, would have produced a different result. It will not be sufficient to show that there was error in the judgment, for the same judgment would have been pronounced against them, had they been cited. *Id.*

83. A wife can in no case sell to her husband, or contract towards him the obligations of a vendor, though the husband may, in some cases, sell to her. She cannot, consequently, be cited in warranty by the representative of her deceased husband. *Wherry v. Bell*, 2 R. R. 225.

84. The members of a commercial partnership have each the right to represent the firm. Admissions by either, will be binding on the rest. *Byrne v. Hooper*, 2 R. R. 229.

85. The plea of the general issue in an action against the acceptors of a bill of exchange, admits their signature, which is all that the plaintiff was bound to prove. *Carmena v. Peyroux*, 2 R. R. 303.

86. The signature of the petitioner to an affidavit which the law requires to be annexed to the petition, is a sufficient signature of the petition itself. *Zollicoffer v. Briggs*, 3 R. R. 236.

87. A party entitled to the compensation due to the owners of the contiguous lots, from a proprietor of the intermediate ground who has made use of their walls, may cumulate in one action the debts due for the use of the walls of both owners. *Kennedy v. Oakey*, 3 R. R. 404.

88. In an action on a joint contract all the obligors must be made defendants, though one of them may have performed his part, or may be domiciliated in a parish beyond the jurisdiction of the Court; parties contracting joint obligations being considered to waive the personal privilege of being sued before the Court having jurisdiction over the place of their domicile; and the judgment must be against each defendant, separately, for his proportion. *Thompson v. Chretien*, 3 R. R. 26. *Drew v. Atchison*, 3 R. R. 140.

89. The judgment for costs, in an action on a joint contract, must be *in solido* against those who have not performed their part. *Id.*

90. In an action on a joint contract, the suit was dismissed by the inferior Court as to one of the defendants, on the ground of his domicile being in a different parish. Plaintiff took no appeal from the judgment of dismissal, but obtained a judgment against the other defendant. On an appeal by the latter: *held*, that the action being on a joint contract, both contractors must be before the Court; that the plaintiff having failed to make use of the means given him by law to reserve the erroneous decision of the inferior Court, cannot avail himself of his own neglect; and that there must be judgment as in case of non-suit. *Thompson v. Chretien*, 3 R. R. 26.

91. Where a party to a suit pending before a State Court applies to be declared a bankrupt under the act of Congress of 19th August 1841, the proceedings must be suspended, for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in bankruptcy is pronounced, the bankrupt, in relation to all actions for and against him except such as the statute prescribes, is legally dead, and can only be represented by the assignee. *Fisher v. Vose*, 3 R. R. 457.

92. An overseer, though entitled to a privilege on the crop for the payment of his wages, cannot maintain an action against his

employer in the parish in which the plantation is situated, where the domicil of the latter is in a different parish. The privilege granted by law to overseers, is, like all others, an accessory to the principal obligation, and must follow it. *Hollander v. Nicholas*, 3 R. R. 7.

93. The penalty imposed by the eighteenth section of the act of 7th June, 1806, on the owner or occupier of a plantation, for keeping slaves thereon, without a white or free colored person as manager or overseer, can only be recovered by civil action before an ordinary tribunal. The action must be brought before a justice of the peace, a Parish, or District Court, according to the number and amount of the fines claimed. *State v. Linton*, 3 R. R. 55.

94. Discussion like all other dilatory exceptions, must be pleaded *in limine litis*. It cannot be received after issue joined. *Dwight v. Linton*, 3 R. R. 57.

95. Under article 335 of the Code of Practice, the exception of *litispendencia*, must show the pendency of another suit, between the same parties, for the same object, and growing out of the same causes of action before another Court of concurrent jurisdiction. *Succession of Ludewig*, 3 R. R. 92.

96. The exception of *litispendencia* must be plead *in limine litis*. Where it is not pretended that judgment has been rendered in the first suit, it cannot be admitted in bar. *Long v. Long*, 3 R. R. 108.

97. An exception to the jurisdiction of the Court, waived below, cannot be revived in the appellate Court. *Reynolds v. Rowley*, 3 R. R. 201.

98. There is a class of exceptions which may be pleaded for the first time on the appeal; but the facts necessary to sustain them, must appear from a mere inspection of the record. *Zollicoffer v. Briggs*, 3 R. R. 236.

99. A prayer for a trial by jury, by one of two or more debtors bound *in solido*, will not enure to the benefit of those who have not joined therein. *Mulhollan v. Henderson*, 3 R. R. 297.

100. Where the defendant, in a redhibitory action for the price of a slave, pleads a general denial, and specially denies that he was aware of the alleged unsoundness, he cannot set up in his defence that the alleged defect was one which the buyer might have discovered by simple inspection. Such an exception should have been pleaded specially, to put the plaintiff on his guard, and afford him an opportunity of disproving the fact. *Hivert v. Lacaze*, 3 R. R. 357.

101. One who relies on a peremptory exception, founded in law, must plead it specially. *Id.*

102. The putting a debtor in default, is a condition precedent to the recovery of damages for the violation of a contract. The want of it need not be pleaded, but may be taken advantage of at any time. C. C. 1906. *Hodge v. Moore*, 3 R. R. 400.

103. Where the petition prays for a judgment against defendants

in solido, and one of the latter severs in his answer, but does not plead that the obligation is joint only, and judgment is rendered against defendants *in solido*, it will not be disturbed on appeal. *Comstock v. Païe*, 3 R. R. 440.

104. Pleas in compensation must be set forth with the same certainty as to amounts dates, &c., as would be necessary if the party, setting them up were the plaintiff in a direct action. General allegations will not suffice. *Smith v. Scott*, 3 R. R. 258. And so of demands in reconviction. *Jonau v. Ferrand*, 3 R. R. 364.

105. A balance due on an unliquidated account, cannot be pleaded in compensation to an action on a due bill or *bon*; nor in reconviction, when unconnected with the plaintiff's claim. *Id.*

106. An amended petition propounding interrogatories to a party to the action, offered after the trial has commenced will be too late. *Dabbs v. Hemken*, 3 R. R. 123.

107. As a general rule, amendments should be admitted where the justice of the case will be promoted thereby, but they must be presented before going to trial. The case must be an extraordinary one, to justify the reception of an amendment after the trial has commenced; and the amendment must be calculated to produce delay. *Id.*

108. A party to a suit, interrogated as to a particular fact, cannot, under the pretext of answering the interrogatory, annex to his answer letters of a third person, and thus introduce in evidence statements not under oath, for the purpose of influencing the jury on other points in the case. *Reynolds v. Rowley*, 3 R. R. 201.

109. A party to a suit is not bound to answer interrogatories propounded to him by his opponent, unless ordered to do so by the Court. C. P. 348. *Commercial Bank of Natchez v. King*, 3 R. R. 243.

110. Where an action commenced by an administrator, is carried on, after the expiration of his administration, by the heirs, the defendant cannot examine him as a party, by annexing interrogatories to amended answer. The term of his administration having expired, he had no interest in the case, and cannot be interrogated as a party. *Hawkins v. Brown*, 3 R. R. 310.

111. Any consent given, or admission made on record, by a party, in the progress of a suit, from which his adversary may derive any legal right, cannot be withdrawn without the consent of the latter, who is entitled to the benefit of its full legal effect. *Aliter*, where such consent or admission confers no right, as where experts have been appointed, by consent, to ascertain a fact, in which case either party may move to rescind the order, or it may be done by the Court ex-officio. *Kohn v. Marsh*, 3 R. R. 48.

112. Property of certain minor heirs having been sold by the Parish Judge, was afterwards seized under an execution by a creditor of the purchaser. The tutor of the heirs opposed the payment of the proceeds of the sale to the creditor, claiming a vendor's pri-

vilege for the price yet due, and setting up a mortgage given to secure the payment. In an action subsequently commenced by him, on behalf of the minors, against the syndic of the purchaser, to recover the land: *held*, that his opposition to the payment of the proceeds to the seizing creditor, could not preclude the minors heirs from claiming the land itself. *Beard v. Morancy*, 3 R. R. 119.

113. A defendant will not be permitted, by shifting his grounds of defence, to contradict, by an amended answer, facts stated and admissions made by him in his original answer. *Estill v. Holmes*, 3 R. R. 134.

114. Action by the payee on a promissory note. Defendant answered, pleading a failure of consideration, and alleging that the note was given in error, for the price of a tract of land purchased by plaintiff from a person to whom defendant had previously sold it. In an amended answer, filed at a subsequent term, he averred that the note was executed for the price of a tract of land belonging to the United States to which plaintiff pretended to have a pre-emption right; and which he bound himself to convey by a good title to defendant; that plaintiff had no pre-emption right to the land; and that the United States had sold the land to a third person, which sale had come to defendant's knowledge, since the last term of the Court. The sale by the United States was established. *Held*, that the defendant could not be allowed to gainsay the admissions originally made by him, and that he must be estopped by his warranty, as vendor, from praying for a rescission on the ground of want of title in the plaintiff. Judgment in favor of the latter. *Id.*

115. Where in an action against the maker of a note, in whose hands different creditors of plaintiff have seized all sums due by him to the latter, defendant denies that he is indebted to the plaintiff, he will not be exempted from the payment of interest, on the ground of uncertainty as to whom he should pay. Having denied that he was at all indebted, he cannot allege that he was prevented from paying by any uncertainty as to whom he should pay. *Rightor v. Ilidell*, 3 R. R. 375.

116. Instead of striking out any portion of the pleadings, a more regular course is to permit the parties to go to trial, and to reject on the objection of the opposite party, any evidence offered to sustain such portion. *Jonau v. Ferrand*, 3 R. R. 364.

PLEADINGS.

1. The plaintiff is bound to set out every fact material to his case, whether it involves a positive or a negative; but he is not required to allege the absence or non existence of facts which might defeat his action. *Mathews v. Pascal's executor*, 13 L. R. 47.

2. In a redhibitory action, under the statute of 1834, which presumes that a slave is a *runaway at the time of sale*, if he elopes within sixty days afterwards, it is sufficient to *allege* that the slave in question *ran away* within a *few days* after the sale, when the evidence shows it was less than sixty. *Mathews v. Pascal's executor*, 13 L. R. 47.

3. So, if the infliction of no usual punishment is proved, or that the slave has been in the State more than eight months, it destroys the presumption of law, that a redhibitory vice existed at the time of sale; but the plaintiff is not required to allege that neither of these facts existed. *Id.*

4. But it has been held, that a plaintiff who claimed the forfeiture of a slave, on its removal from Virginia by a tenant widower, *without the consent* of the reversioner, or heir, was bound to allege and prove the absence of that consent. *Id.*

5. It is a general rule that the negative is not to be proved, but this does not apply to a case in which a party charges another with a culpable neglect or breach of duty; for it is one of the first principles of justice, not to presume that a person acted illegally. *Id.*

6. Where the buyer institutes his redhibitory action under the act of 1834, which creates the presumption that a slave who runs away within two months after the sale, was a *runaway* before the sale; provided said slave had not been in the State *more than eight months*: held, that the plaintiff need not allege and prove this fact. It is for the defendant to show that he comes within *the proviso* as a matter of defence. *Id.*

7. The want of the christian name of the defendant in the petition, if it be a dilatory exception, is waived by a plea to the merits. *Parmely et al. v. Bradbury*, 13 L. R. 351.

8. The original and supplemental petition are to be taken as one and the same proceeding. Any variance between a note or document annexed. and the description of it in the petition, is cured by the note or document when offered in evidence, which must govern. *Weyman et al. v. Cater & Cropp*, 13 L. R. 492.

9. A plea denying the consideration, requires the plaintiff to prove it; but if there be also a plea of failure of consideration, the party himself must show it. *Tissott et al. v. Bowles*, 18 L. R. 29.

10. Costs on leave to amend pleadings are not required to be paid up before the suit proceeds, as in case of non-suit or discontinuance. *McCabe v. Gentes*, 18 L. R. 31.

PLEDGE.

1. Creditors holding certain notes in pledge, which they cause to be seized by the sheriff, on their judgment, do not, thereby, divest themselves of the possession of pledge; although illegally seized, they are still in the possession of the sheriff, as an officer of Court,

subject to the right of the pledgees. *Goodrich et al. v. Southmayd*, 13 L. R. 339.

2. Where an act of pledge transfers to the pledgee all the pledgor's rights and interest to certain notes secured by mortgage, subrogating him to all his rights of proceedings by executory process to enforce payment of the notes, the pledgee may have his order of seizure in the same manner as the pledgor could have had. *Armstrongs v. Baldwin*, 13 L. R. 564.

3. Where bank stock is pledged to secure a debt due to the Bank, and is afterwards transferred in payment at its full value, although made on the eve of insolvency, it does not prejudice other creditors, and is not fraudulent as to them. *Caldwell et al. v. Atchafalaya Bank*, 14 L. R. 308.

4. A seizing creditor can call for the production and inspection of notes and bills given in pledge, notwithstanding the answers of the pledgee that he has them in pledge. The creditor has a right, by inspection, to ascertain whether the pledge was complete by the endorsement of the pledgor. *Sewall v. McNeil et al.*, 17 L. R. 185.

5. The pledge of a bill of exchange or promissory note by notarial act; although endorsed by the payee in blank, is not complete and binding as against third persons and creditors without endorsement of the pledgor, if the instrument be negotiable. *Id.*

6. A subsequent transfer of notes with *notice and delivery*, will hold against a prior pledge and transfer by notarial act, *without actual delivery*, although due notice had been given. *Winchester v. Ory's syndics*, 17 L. R. 428.

7. The pledge of a claim or note, on another person, must be by notarial act with *actual delivery* of thing pledged; and if it be a negotiable note it must be endorsed. Without such a transfer and delivery the rights of third parties are not affected. *Id.*

8. A Bank, authorised to discount as incident to lending money, may take security; so also it may lend money on the faith of a cotton crop; and cause the cotton to be shipped by an agent to be sold to reimburse the loan without violating its charter. *Deloach v. Jones et al.*, 18 L. R. 447.

9. Where in a common law State, a party pledges his cotton crop for a certain sum advanced to him, and the pledgee is authorised and required to sell the cotton for reimbursement: *held*, that as a pledge, it was defeasible, before delivery, but *afterwards* the contract was complete. *Id.*

10. Delivery is essential to the validity of a contract of pledge in a common law State; and even a parole agreement followed by delivery, is legal and binding on the parties and third persons. *Id.*

11. In a case of pledge or bailment of goods or personal property, without limitation of time for redemption, the creditor may call on the debtor to redeem after his debt is due, by having a judicial sale, under a decree of foreclosure; or upon giving a reasonable

notice to the debtor to redeem. But the parties may stipulate as to the time and *mode* of sale. *Deloach v. Jones et al.*, 18 L. R. 447.

12. So a contract partaking of the features both of pledge and of an assignment in trust to secure the payment of a debt, is valid in a common law State. *Id.*

13. So, where cotton is pledged to secure payment of a loan of money, and delivered to the agent of the creditor, making the advance, who ships it to be sold for the purpose of paying this loan; it is not liable to an attaching creditor in the hands of the consignee, who is made garnishee. *Id.*

14. The pledgee is bound to take care of the thing pledged as a prudent administrator, and is answerable for the loss or decay of the pledge occasioned by his fault or negligence. *Crocher v. Monrose*, 18 L. R. 553.

15. The pledgee in case of destruction of the thing pledged, by inevitable accident, must prove the identity of the pledge, and that he used every diligence and care to preserve and save it, to entitle him to recover back the sum advanced on it. *Id.*

16. By receiving a pledge from his debtor, a creditor incurs no obligation to grant a delay. *Duncan v. Elam*, 1 R. R. 135.

17. The authority given by law to the cashiers of Banks to execute acts of pledge, confers on those officers only the powers of notary publics in relation to such contracts; and none of the forms essential to the contract can be dispensed with. *Robinson v. Shelton*, 2 R. R. 277.

18. It is essential to the validity of a pledge, as to third persons, that notes or other obligations payable to bearer or order, which form the subject of the pledge, should be endorsed by the payee or pledgor. C. C. 3128. *Id.*

POLICE JURY.

1. The construction of dikes and levees, and removal of obstructions in the beds of rivers and navigable streams, are under the exclusive jurisdiction of the police jury of the parish through which these streams run. *Sicard v. Chitz et al.*, 13 L. R. 111.

2. So, where the defendants, by order, of the police jury of Pointe Coupée, cut away a dam and removed the obstructions in the bed, and which had been made across *Fausse Rivière*, by the plaintiff: *held*, that they were not liable in an action for damages at the suit of the plaintiff. *Id.*

3. Police juries are civil corporations, and may sue and be sued. *Police Jury of St. Helena v. Fluker, administrator*, 1 R. R. 389.

4. The Police Jury of a parish is a political corporation. It may sue and be sued, and act through agents of its own appointment. *McGuire v. Bry*, 3 R. R. 196.

POSSESSION.

1. No physical act in taking possession, is necessary under a sale by notarial act. The intention of the purchaser, which the law presumes, coupled with the power which the act of sale gives, vests the possession in him. The right is taken for the fact, and the buyer is seized of the thing corporally by the execution of the title. *Ellis v. Prevost*, 13 L. R. 230.

2. There is but one kind of possession known to the law, which commences by the corporeal apprehension of the thing, or the signing of the title which transfers it; and continues whether or not the possessor actually occupies and detains the thing, until he be disturbed in fact or in law. *Id.*

3. So, all possessors, who have possessed quietly and without any interruption, by virtue of one of the titles prescribed in the 4th article of the Code of Practice, for more than a year, previous to being disturbed, can maintain a possessory action; and the possession of less than one year is sufficient, in case of eviction by force and fraud. *Id.*

4. Where a party proves actual possession to certain and fixed boundaries, by making roads, levees and the front fences, he will hold by prescription to the extent of his boundary, against an older title. *Blanc v. Duplessis et al.*, 13 L. R. 334.

5. When two possessions lap, that which is most perfect and best characterizes the right of property, is to be preferred; that which is corporeal and manifested by acts peaceable and notorious, will prevail over that which is merely intentional. *Id.*

6. No relative nullities in titles accompanied by possession, not even those resulting from fraud, can be inquired into collaterally; it must be by direct action. *D'orgenoy et al. v. Droz*, 13 L. R. 389.

7. Naked possession for more than a year, creates the presumption in the possessor, sufficient to put the right owner upon proof of his title. He must make that proof, as plaintiff, in a direct action for that purpose, and is not permitted to throw the burden of proof on the possessor, by alleging title when he is sued for a disturbance. *Id.*

8. So the person claiming to be the right owner, when sued for disturbance, cannot bring a petitory action until after judgment in the possessory one; and if he is condemned, not until he has satisfied the judgment. *Id.*

9. A final judgment has the effect to exclude any adverse possession, within the boundaries it establishes; any subsequent possession must be by enclosures, or under a new title, to avail the party. *Moore et al. v. Pontalba*, 13 L. R. 571.

10. The confirmation of a land claim is no new title, and will not avail the claimant for the possession, against a confirmation previously made by the board of commissioners, of which the claimant had notice. *Id.*

11. Where a party purchases without warranty, and without ever taking possession under his title, he must be presumed to be cognizant of the defects of the possession and title of his vendor. *Moore et al., v. Pontalba*, 13 L. R. 571.

12. The possession of an usurper enures to the benefit of the real owner; and his bad faith cannot in any manner destroy or impair the right of possession, previously held in good faith. *Dewall v. Choppin et al.*, 15 L. R. 581.

13. But where the possession may have been obtained in bad faith; or the possessor may have been guilty of fraud when he acquired his title, yet third persons not claiming under the same original title, or the party in whom it vested, cannot inquire into its defects or relative nullities. This can be done only by those who have suffered from his acts. *Id.*

14. No relative nullities in titles or deeds, accompanied with possession, even those resulting from fraud, can be inquired into collaterally. *Id.*

15. A corporeal possession in the beginning, a civil one will be sufficient to complete the possession already begun and support the prescription of ten years. *Wilcoxon v. Rogers et ux.*, 16 L. R. 6.

16. One who does not possess as owner, cannot acquire a title by prescription. *Wafer v. Pratt, sheriff, and another*, 1 R. R. 41.

17. Where vendor or vendee live in the same house, possession follows title. *Id.*

18. Where one takes peaceable possession of a portion of the public domain, to which no other person has a claim, and possesses it in good faith, he will be protected to the extent of his enclosures, *Griffin v. Cotten*, 1 R. R. 142.

19. Actual possession of part of a tract of land, with title to the whole, is possession of the whole; but the party alleging such possession must show fixed and certain boundaries to the tract, the whole of which he claims by establishing actual possession of a part, otherwise possession of a few acres might be extended to any number, according to the interest of the party. *Gillard and others v. Glenn and others*, 1 R. R. 159.

20. Possession of a negotiable instrument endorsed in blank is *primâ facie* evidence of ownership, and yields only to proof to the contrary. *Dussin v. Charles and another*, 1 R. R. 195.

21. Prescription cannot avail one not in possession. *Hart and others v. Foley*, 1 R. R. 378.

22. Defendant being in possession, no prescription can bar his right to contest the validity of the title under which the plaintiff claims. *Id.*

23. Article 1988, declaring that a creditor cannot sue to annul a contract made before the time when his debt accrued, applies to contracts apparently complete and regularly carried into effect by the debtor, and does not extend to cases where the latter has never been out of possession of the property pretended to have been sold,

and where third persons have treated with him on the faith of his being the owner of the property so found in his possession. *Laville v. Hebrard and another*, 1 R. R. 435.

POSSESSORY ACTION.

1. In a possessory action the civil possession of the plaintiff, preceded by an actual and corporal detention of the thing, will suffice, as it allows him the benefit of the previous corporeal possession of his author. *Ellis v. Prevost et al.*, 19 L. R. 251.

2. The Court do not recognize the doctrine, that there is but one kind of possession; and that civil possession will suffice in all cases in possessory action. *Id.*

3. Possession is required by the actual and corporal detention of the property; this is natural possession or possession in fact; and it is preserved and maintained by the mere will or intention to possess, and this is civil possession or possession in right. *Id.*

4. So, where a person is disturbed in his possession, he has the right, within a year and by virtue of his civil possession, founded on his previous corporal and actual possession to institute the possessory action, to recover it. *Id.*

5. The person claiming by possession alone, without showing any title, must prove an adverse possession by inclosures, and his possession cannot extend beyond. *Id.*

6. Where a citizen peaceably takes possession of a portion of public land or domain, to which no private claim is set up, and improves it, none but the government can disturb him in the possession of that he has actually inclosed. *Miller v. Lelen*, 19 L. R. 331.

7. Where the vendor and vendee live in the same house, possession follows title. *Kemper's heirs v. Hulick*, 19 L. R. 349.

8. So, where the son was possessed of a slave, who was assessed in his name and lived in the common dwelling with his father at his death, and his widow took the slave with her when she removed: held, that she was the legal possessor. *Id.*

9. The plaintiff is not bound to show a perfect title to recover against a trespasser without title, provided he has actual possession. When a civil possession is relied on alone, the title must be *prima facie*, such as would be translativ of property. *Patin v. Blaize junior*, 19 L. R. 396.

10. Title papers are admissible in evidence in a possessory action, to show the extent and limits of the plaintiff's possession; although no inquiry can be had as to the validity of titles in this action. *Lecomte v. Smart*, 19 L. R. 484.

11. Where a person takes possession of land under an apparent

title as his own, slight acts will be received as evidence of an intention to take actual possession. *Lecomte v. Smart*, 19 L. R. 484.

12. But where a man without any pretence of title, goes upon land claimed by another, he must show unequivocal acts of possession, more *than a year*, to maintain the plea of prescription. *Id.*

POYDRAS' WILL.

1. There is no discrepancy between the cases of *Moosa vs. Alain*; 4 Martin N. S. 99, and that of *Poydras vs. Mourain* 9 L. R. 492. The First is a slave suing for certain privileges under a will, who has no capacity to stand in judgment in any matter, but for his freedom; and the last is the heir claiming a compliance with the conditions of his ancestor's will, from the purchasers under it. *Poydras v. Taylor et al.*, 18 L. R. 12.

2. The purchaser of a plantation and slaves subject to the provisions of the will of the original proprietor, that the slaves were always to be kept on the plantation and never sold apart from it, must comply with the conditions, however onerous. *Id.*

PRACTICE.

1. Service of both citation and petition is necessary to bring a party into Court to answer, which is not waived by the defendant's exception, pleading a *misnomer*. *Slocomb et al. v. Bowie*, 13 L. R. 10.

2. The possession of a note endorsed in blank is *prima facie* evidence of property in the plaintiff, sufficient to throw the burden of proof on the defendant. When the signature is not denied the plaintiff is not bound to prove it. *Burns v. Haynes et al.*, 13 L. R. 12.

3. An exception putting at issue the capacity of the plaintiff to sue, is a matter of fact which may properly be submitted to a jury, with the other matters of defence on the merits, the whole being peremptory exceptions. *Hosea's widow and heirs v. Miles*, 13 L. R. 107.

4. The fact on which a continuance is asked, should be established by affidavit. *Id.*

5. A verdict *for the plaintiff* without stating for what amount or object, is incorrect, and should be set aside, and a new trial awarded. *Id.*

6. A verdict and judgment, which are deficient in the forms required by law, will be annulled and set aside; but when this Court is in possession of all the facts and evidence to enable it to pro-

nounce definitively in the case, it will render such judgment as should be given in the Court below, on the merits. *Hosea's widow and hiers v. Miles*, 13 L. R. 107.

7. Where the party failed to procure the necessary evidence to support his title, and the justice of the case seemed to require it, the cause was remanded for a new trial, *Culliver v. Garie et al.* 13 L. R. 137.

8. Where proof of *authorization* under which the wife was proceeding in her suit, being insufficient, and the defendant having the right to a final decision on the merits, the Court, instead of nonsuiting the plaintiff, remanded the case for a new trial, and for both parties to make new proof. *Garnier v. Poydras*, 13 L. R. 177.

9. Eustis J. dissenting. Was of opinion judgment of non-suit ought to be entered, as the plaintiff would not be bound by a judgment against her; and it was unjust to allow her to litigate her rights without being bound by a decision adversely to them. *Id.*

10. This case involves simply a question of fact, turning upon the credibility of a witness, and the judgment of the inferior Court is affirmed. *Nott v. Botts*, 13 L. R. 202.

11. When the case presents no question but one of ownership, which turns on mere matters of fact, and the evidence is multifarious and contradictory, the judgment will be affirmed, *Young v. Walker et al.*, 13 L. R. 262.

12. A motion for a new trial, after the expiration of three days from the rendition of the judgment, is correctly overruled by the inferior Court. *Chandler et al. v. Barker*, 13 L. R. 316.

13. The defendant's counsel may require the clerk, on the cross-examination of the *first witness*, to take down his answer in writing, even when neither party desired it at the commencement of the examination. *Pilié v. Stewart*, 13 L. R. 364.

14. Where the judge refused to allow the testimony to be taken down in writing by the clerk, after the examination of witnesses had commenced, judgment was reversed and a new trial awarded. *Id.*

15. When a suit or demand is premature, or when the obligation sued on is conditional, and its execution demanded before the condition has been fulfilled, the action must be dismissed. *Groning et al. v. W. & L. Krumbhaar*, 13 L. R. 402.

16. If the defendant on the trial, abandons title to the property claimed in the petition, but insists on his claim for damages set up in compensation of the plaintiff's demand, and the latter permits the case to go to the jury in this manner without objection, the verdict and judgment will not be disturbed on this ground. *Williams v. Barton*, 13 L. R. 404.

17. The judge can disregard the testimony of witnesses if he disbelieves them, and give judgment as if no evidence had been adduced, on his own knowledge of the case. *Howe v. Manning's executor*, 13 L. R. 412.

18. The acknowledgment of the father to pay the note of his son, was indirect, and failed to satisfy the district judge of his liability, and this Court did not feel authorised to disturb the judgment. *Hoffman v. Holland*, 13 L. R. 418.

19. The sickness of a witness not summoned, and the absence of the attorney trying a suit in another Court, are no grounds for a continuance or a new trial. *Soey's heirs v. Soey's curator*, 13 L. R. 424.

20. This case was remanded for the defendant to prove offsets to the note sued on, and no further evidence being offered, judgment was properly given for the entire sum. *Yard & Blois v. Syndic Srodes*, 13 L. R. 427.

21. The Supreme Court will not consider one decision alone as finally settling the jurisprudence on any given point or question of law, which is not settled by positive legislation. *Priscilla Smith, f. w. c. v. Smith*, 13 L. R. 441.

22. In a case of redhibition depending upon the testimony of witnesses which stands uncontradicted, and the judge *a quo* gave full faith to it, this Court cannot afford relief to the appellant. *Peyroux v. Chasal*, 13 L. R. 459.

23. The execution of a bail bond need not be proved when it purports to have been signed in the presence, and witnessed by a person who certifies the record *as clerk* of the Court: this will prove his quality or capacity as clerk in his signature to the bond. *State v. Gossin et al.*, 13 L. R. 96.

24. In judicial proceedings, when the contrary is not shown or does not appear, the presumption is that they were regular. *Hubbell v. Clannon*, 13 L. R. 494.

25. Where the judgment expresses that it was confirmed and made final on due proof of the plaintiff's demand, it is sufficient grounds, according to the article 315 of the Code of Practice. *Id.*

26. The neglect of the clerk to record the judgment cannot authorize its reversal. *Id.*

27. A judgment becomes final *three days* after its rendition, although prematurely signed. *Id.*

28. The maker of a note cannot complain that judgment was not rendered against him and the endorser *in solido*, even when they are both sued. *Id.*

29. In a petitory action on failure to show title in the plaintiff, judgment must be for the defendant. *Adams, administrator, etc. v. Bell*, 13 L. R. 555.

30. In all cases where suits are instituted by associations, or partnerships, the parties or partners in interest, must be made parties to the suit on the contract or act of association. A portion of the partners, or share holders, cannot maintain an action without joining all. *Allard et al. v. Ocean Navigation Company*, 14 L. R. 27.

31. Where the legality of issuing an order of seizure and sale

has been passed upon, in an opposition made by the defendant, the Court will take no further action on the matter, when brought up on a rule to show cause why an alias order of seizure should not be set aside. *Florance v. Wilcox*, 14 L. R. 58.

32. If on an examination of the record, the appellant appears to be entitled to relief, the Court will award it according to the nature and justice of the case. *Painpure v. Martin*, 14 L. R. 59.

33. So, where by the record it appeared the verdict was entered for six hundred dollars, or the return of a note, &c., upon which judgment was rendered for six hundred dollars *to be satisfied* by the return of the note, &c., and the evidence showed that it should be for six hundred dollars, and the return of the note, &c., this Court gave judgment accordingly. *Id.*

34. A sheriff's account for fees or charges need not be proved, when not contested or required by the Court. The law provides that the fees for keeping personal property and slaves, taken under legal process, shall be at the discretion of the Court. *Avart v. King et al.*, 14 L. R. 62.

35. After an answer to the merits, the plaintiff cannot proceed to take judgment *ex parte*, without setting the cause for trial, because the defendant merely neglected to answer interrogatories, which were taken for confessed. He can only avail himself of the confession as proof on the trial. *Behan v. Hite*, 14 L. R. 67.

36. In a collision between a steam-boat and flat-boat, by which the latter and its cargo were lost, and the weight of testimony going to show the fault was with the former, the owners thereof were held liable for the loss. *Vanlandingham v. Achison et al.*, 14 L. R. 73.

37. Also in a contest about the occupation of leased premises, which is submitted to a jury, it is properly a question of fact; and the verdict being justified by the evidence, it will not be disturbed, although against both parties. *Palfrey v. Scates & Baggett*, 14 L. R. 79.

38. Where judgment by default is confirmed and made final, after answer filed and prayer for a jury without a trial, it vitiates the proceedings, and the case will be remanded. *French v. Putnam et al.*, 14 L. R. 97.

39. A prayer by the appellee to amend the judgment in his favor, comes too late when only filed on the day the cause is set for argument. *Gibson v. Huie, etc.*, 14 L. R. 129.

40. Where a defendant *avers* that a certain note held by him and attached in the hands of the makers was transferred by him before service and notice of the attachment, and *fails to show this*, it will be taken for *granted* he was still in possession. *Id.*

41. Where a re-hearing is granted only on a particular branch of a cause, no other part of it can be examined on the second trial. *Hopkins et al. v. Laplace, syndic, etc.*, 14 L. R. 145.

42. In an action of slander of title, claiming damages, it is not ne-

cessary to allege and show that the defendant is in possession; and his exception disclaiming possession and title will not authorize the dismissal of the suit. The plaintiff has the right to try the issue of slander of title, and to show damages if he can. *Hewitt v. Seuton et al.*, 14 L. R. 159.

43. The signature of a constable to a return of service of citation made by him, will be taken as true, without proof being made of it. *Graham's heirs v. Gibson*, 14 L. R. 146.

44. Where the allegations in the petition are vague and insufficient, they may be rendered certain by the averments in the answer, and evidence admitted under them in aid of the plaintiff's case which would have been excluded for want of proper allegations. *Burland v. Carrollton Bank*. 14 L. R. 189.

45. A sale having all the forms of a legal sale by authentic act, cannot be treated as a nullity, even if fraud is alleged. *Id.*

46. Questions of fact, and the assessment of damages are peculiarly subjects for the consideration of a jury. *Martin et al. v. Nally*, 14 L. R. 205.

47. In a case involving facts only; and there being no positive evidence of the facts as alleged, this Court refused to disturb a verdict in the negative. *Williams v. Lanier*, 14 L. R. 210.

48. Where a cause has been laid over from day to day until the last day of the term, the defendant will not be allowed to delay the trial, in order to attach his witnesses; but will be ordered to proceed in the trial unless he discloses and shows the materiality of their testimony. *Raby v. Brown*, 14 L. R. 247.

49. A simple denial of the plaintiff's right to sue as the holder of a negotiable note or instrument, cannot authorize the maker to contest his title to it, when he holds by a blank endorsement, unless it has been lost or mislaid. *McKinney v. Beeson's Estate*, 14 L. R. 254.

50. A party pleading minority and it is shown that he is near the age of majority, *he must clearly make it appear* that he was a minor at the time of the contract, or his plea will not avail him. *Davis v. Coan*, 14 L. R. 257.

51. Where the defendants are interrogated as to the consideration of the note sued on, and neglected to answer; their silence must be taken *pro confessis*, and it will be deemed full proof. *Polo & Tivilier v. Natali et al.*, 14 L. R. 260.

52. It is not a valid objection to testimony that two witnesses were examined together, and made oath to the same facts, in the same deposition. There is no law prohibiting a joint examination of witnesses, and taking their joint testimony in one deposition. *Clark v. Clark et al.*, 14 L. R. 270.

53. A party has no right to interrogate a juror, on oath, whether he understands the english language. *Gay v. Ardry*, 14 L. R. 288.

54. The plea of the general issue admits the signature of the maker of the note sued on. *Vairin et al. v. Palmer*, 14 L. R. 361.

55. Whatever might have been cured by evidence or admission in the Court below, cannot be assigned as error apparent on the record. *Nott et al. v. Brander et al.*, 14 L. R. 368.

56. When the certificate to the record shows that it contains all the evidence adduced on the trial, the appellant may at any time call the attention of this Court to any error on the face of the record; or try the case on the merits without any assignment at all. *Id.*

57. The plea of the general issue and compensation by the maker of a note, is an admission of the plaintiff's title to sue on it. *Rost et al. v. Byrne*, 14 L. R. 372.

58. It is no ground of complaint that the cause was tried *ex parte* when the defendant neglected to attend. *Thayer et al. v. Rieder*, 14 L. R. 383.

59. Where the error assigned, might have been cured by evidence, it will not avail the party. *Id.*

60. Where a plea in compensation and reconvention is sustained by the evidence, judgment will be given against the plaintiff for the balance due after extinguishing his demand with interest. *Zéringue v. Rixner*, 14 L. R. 385.

61. Immaterial amendments even if erroneously allowed, or rejected, where they cause no injury or prejudice to the party, will not be allowed to interfere with the judgment, or cause its reversal in this Court. *Rio v. Gordon et al.*, 14 L. R. 418.

62. Where the appellant may reasonably have had doubts of the correctness of the judgment below, he will not be condemned to pay damages. *Id.*

63. An exception to the *suit*, alleging that the plaintiff has shown no cause of action, must be first considered independently of any other matter of defence. *Martin v. McMasters*, 14 L. R. 420.

64. A party seeking to recover, must make his claim certain, it is not enough to render it probable. *Adams v. his creditors*, 14 L. R. 454.

65. The ten days allowed for the defendant to answer in, are not required to expire *before* the commencement of the term to which he is cited. As soon as they expire, if the Court is in session, the plaintiff may proceed to take judgment by default if the answer is not put in. *Maurin et al. v. Dashiell*, 14 L. R. 471.

66. Notice of trial may be served on the counsel of the defendant and it is sufficient. *Dwight et al. v. Scates*, 14 L. R. 495.

67. An injunction case, when the answer is in, may be set for trial pending a rule to show cause why the injunction should not be dissolved, and on the day fixed for the trial of the rule. *Williams v. Duer*, 14 L. R. 523.

68. If in the answer to an opposition against an order of seizure and sale, the party sets up matter different from that in his original petition, or which amounts to a replication, it may be disregarded. *Id.*

69. The Union Bank did not lose its capacity to sue and stand in judgment, by the suspension of *specie payments*. *Union Bank v. Mortee*, 14 L. R. 541.

70. As soon as the ten days allowed for delay expire, after service of citation, if the Court is in session, the plaintiffs may take judgment by default, if there is no answer filed. *Carmena v. Mix*, 15 L. R. 165.

71. This Court will not travel out of a bill of exceptions to notice objections which were not made in the Court below. Had they been suggested there, they might have been removed. *Ball's administratrix v. Ball et al.*, 15 L. R. 173.

72. The plea of the general issue and averment, that certain goods described in the petition, were tendered and delivered, does not admit their value, as alleged by the plaintiffs, and dispense with proof of it. *McMaster and Hyde v. Brander et al.*, 15 L. R. 206.

73. Without an answer filed or judgment by default, no reference or submission to arbitrators can be made in a cause; and such a submission may be assigned for error. *Perret & Gally v. Keill & Co., et al.*, 15 L. R. 209.

74. When there is no *contestatio litis*, or judgment by default, all the subsequent proceedings are irregular and void. *Id.*

75. In an action of damages against the masters and owners of two ships for collision, and injury of the plaintiff's vessel, when he had offered all his evidence, one of the defendants (*who severed in their pleas*) moved and obtained a judgment of non-suit, and the other was permitted to introduce evidence proving his own innocence, and showing that the conduct of the defendant obtaining the non-suit, was the remote cause of the collision and injury complained of. *Toulman et al., owners of the brig Hokomok v. Elliot et al., etc.*, 15 L. R. 226.

76. It is within the discretion of the Court to allow or cause a witness to be called and sworn after the evidence of both parties has been closed and the arguments progressed, if the Court is of opinion more light and information is needed on the matter in contest. *Id.*

77. A new trial is within the sound discretion of the Court, which will not be interfered with unless there is manifest error. *Id.*

78. A non-suit legally obtained, the party cannot be deprived of it in the same suit. *Id.*

79. Where the judgment of the inferior Court states that the plaintiff proved all his allegations, and there is no proof of the signature of the first endorser of the note, in the record, the case will be remanded for a new trial. *Florance v. McFarlane*, 15 L. R. 231.

80. The plea of the general issue dispenses with proof of the signature of the maker of a note, but not of that of the payee and first endorser. *Id.*

81. Where a special defence is set up, it may be considered a

waiver of the plea of general issue. *Bank of Orleans v. Whittemore*, 15 L. R. 276.

82. The judge *a quo* possesses discretionary powers of enlarging a rule and postponing a trial, giving further time for hearing the parties; and when this discretionary power is exercised, this Court will not interfere by granting a mandamus commanding him to proceed *instante*. *State v. Judge of Parish Court*, 15 L. R. 284.

83. Where it appears from the record, that complete justice has not been done between the parties, and the trial being by jury, the Court will not render final judgment, but remand the case for a new trial. *Terrill v. Bonnabel*, 15 L. R. 317.

84. The defendants cannot avail themselves of a defence against their liability to pay a certain sum, on the ground that the plaintiff's agent who employed them, was indebted to them, when this matter is not specially pleaded. The plea of the general issue is not sufficient. *Cotton v. Union Bank of Louisiana*, 15 L. R. 369.

85. The defendant may bond his property, but the plaintiff is never allowed the possession of it. He can only demand that it be sold, if it be of a perishable nature. *Comstock et al. v. Paie*, 15 L. R. 481.

86. A person suing as administrator may, if the evidence shows it, recover the sum claimed in his own right. *Childress, administrator, etc. v. Davis & Webb*, 15 L. R. 492.

87. It is necessary that the Parish Judge should designate, in all his proceedings, the capacity in which he acts; and that the proceedings of the Probate Court be conducted and kept distinct from those of the Parish Court. *Segur v. Pellerin*, 16 L. R. 63.

88. Where the record contains no motion for a continuance, or reasons offered for one, the affidavit of the party that he was absent and his counsel not in attendance at the trial, cannot be received in this Court, to open the judgment and remand the case for a new trial, on the ground that great injustice has been done. *Peuch, Bein & Co. v. Palfrey, syndic, etc.*, 16 L. R. 97.

89. A party cannot be heard in the Supreme Court, on his affidavit asking to remand the case for a new trial, on the ground that he was absent, and had no counsel to represent him when the cause was called for trial in the inferior Court. *Compton v. Palfrey, syndic, etc.*, 16 L. R. 99.

90. Where the plaintiff fails to make out his case clearly, he must be non-suited: so, where it did not appear that the person suing as agent, was really such, or that the debt actually existed, judgment of non-suit was entered. *Mouton, agent, etc. v. Thibodeaux*, 16 L. R. 131.

91. On remanding a cause for trial between the warrantors, the plaintiff in the demand in warranty, may amend his answer so as to claim damages from the warrantor. The amended answer does not change the substance of his demand or the legal recourse

against his warrantors. *Melançon's heirs v. Robechaud's heirs*, 16 L. R. 151.

92. Parties have a right to bring in and offer their evidence in the order they choose, and it should not be rejected because that first offered does not prove enough. *Maurin v. Chambers and Williams*, 16 L. R. 207.

93. Where the judge in his statement of facts certifies: that the protest was proved to have been regularly made, and *the notices given accordingly*, it was held sufficient proof of notice to the endorsers; and the Court not being able to see whether the notices were properly given, or to examine the case on its merits the appeal was dismissed. *Union Bank v. Williams et al.*, 16 L. R. 236.

94. Where a cause has been the second time submitted to a jury, and the verdict does not appear manifestly erroneous, it will not be disturbed. *Hood v. McCorkle*, 16 L. R. 240.

95. Where the answer, judgment and part of the parole evidence appears to have been lost, a *certiorari* would be useless, as the record in such case cannot be perfected; and when it appears that justice does not require it, the cause will be remanded for a new trial. *Boler v. Day*, 16 L. R. 251.

96. The letter of the law may be disregarded with the *honest intention* of seeking its spirit when it leads to an absurd conclusion, and the judge is bound to recede from the letter until he arrives at a reasonable conclusion. *Ardry's wife v. Ardry, her husband: Kain & Co., intervenors*, 16 L. R. 264.

97. Where the certificate of the notary, at the foot of an act of mortgage, states it is a true copy, it is sufficient when the seal is also affixed; although the notary does not say, *it is given under his hand and seal*. *Armor v. Lewis*, 16 L. R. 331.

98. In all cases of judgment by default made final, the plaintiff must prove his demand, and not having produced evidence of the defendant's *mark or signature to the note sued on*, judgment for the plaintiff was reversed. *Bryan's administrator v. Spruell*, 16 L. R. 313.

99. A suit for the rescision of a sale for lesion beyond moiety, and on account of the non-payment of the price, cannot be maintained for both demands; as they should not be cumulated in the same action. *Copley v. Flint & Cox*, 16 L. R. 380.

100. Other systems of law may be referred to for light when the great and leading principles of equity are in question, and our laws are silent; but the merely arbitrary rules of a foreign system should not be invoked. *Miller v. Holstein*, 16 L. R. 389.

101. An opposition to the report of commissioners under the act of 1832, for opening streets, &c., which is in the nature of a peremptory exception, destroying the right and power assumed by the corporation, alleging the proceedings to be null *ab initio*, may be put in at any time before judgment homologating the report. *Municipality No. 2 v. McDonough*, 16 L. R. 533.

102. The want of docketing a judgment does not prevent its being executed. *Fink v. Lallande et al.*, 16 L. R. 547.

103. A scroll with letters (L. S.) written in it, will be a sufficient seal to a writ of *feri facias*, when it does not appear the Court had any other. *Id.*

104. Before the adoption of the constitution, a compliance with either the English or French text of the law was sufficient. *Id.*

105. Where manifest justice requires it, the case will be remanded for a new trial. *Lambeth & Thompson v. Rivarde et al.*, 16 L. R. 572.

106. Where the adverse party is notified, by a rule before trial, to show cause why certain depositions shall not be read and no valid objection is made, it is too late at the trial to have them excluded, although there are glaring defects in them. *Anderson v. Dinn*, 17 L. R. 168.

107. Where the verdict substantially settles all the points in controversy, it will be deemed sufficient, although it may not technically embrace each issue arising out of the pleadings. *Id.*

108. If the judgment be different from the verdict, it is not a cause for a new trial, or to remand the case. It will be so amended as to conform to the verdict. *Id.*

109. The petition and prayer for sequestration and for judgment when the note *becomes due*, may be considered a conservatory measure, and the filing of an amended petition after the notes is actually due, with a prayer for judgment, be taken as the inception of the suit. *Nelson v. Pool*, 17 L. R. 209.

110. So a branch of the Union Bank has no legal or corporate existence to enable it to sue or stand in judgment; and although the owner of a negotiable instrument, yet having no capacity to sue, no action can be maintained by it on said instrument. *Union Bank v. Dunn et al.*, 17 L. R. 234.

111. Parties are not to be controlled in the order or manner of introducing the different parts of their evidence of their case. *Perkins v. Nettles, administrator*, 17 L. R. 253.

112. The plea of payment relates to transactions between plaintiff and defendant: under the plea of the general issue the defendant may show that the plaintiff has no claim or a *less one*; or show money paid on his, plaintiff's, account for his maintenance or education, he being a minor; and in general, every payment may be proved, made to any person except the plaintiff, which tends to destroy or lessen his demand. *Davis v. Davis's syndic*, 17 L. R. 259.

113. Where an answer is put in and acted on, it cannot afterwards be objected to or assigned for error, that the clerk omitted to mark it filed. *Copeland v. Mickie et al.*, 17 L. R. 286.

114. Although the want of proper parties can, in general, only be taken advantage of by plea or exception; yet if the plaintiff singled out a part of those who were parties and took judgment against them, while as to others the cause was continued it may be assigned

as error apparent on the face of the record. *Reynolds, Byrne & Co. v. Feliciana Steam-Boat Co.*, 17 L. R. 397.

115. It is not required to be proved that the laws of Mississippi, where a note is made payable, need not be presented for payment at the place designated therein, in order to maintain an action against the maker, when the want of demand is not pleaded. *Wetmore & Co. v. Mirrifield*, 17 L. R. 513.

116. Proof of the defendant's signature as acceptor, and also of the payer of the bill, is required before a recovery can be had, where the general issue is pleaded and the signatures of the acceptors specially denied. *Freyer et al. v. Darcy*, 17 L. R. 527.

117. A party should not be permitted to take a second rule, even for a new cause, after having unsuccessfully attempted to sustain the first one for the same purpose, unless the new cause should have arisen afterwards. *Buel v. New-York Steamer et al.*, 17 L. R. 541.

118. A witness may be introduced and examined by either party after the evidence is closed, when offered before commencing the argument. *Id.*

119. An exception to the charge of the Court must be taken when the judge shall have finished his charge; before the jury retire and in their presence. *Id.*

120. There is no necessity of stating in full the names intended by the letters placed between the names and sur-names of the plaintiffs in the petition. *Shipman & Ayres v. Haynes*, 17 L. R. 503.

121. Where a commission is addressed to W. E., notary public, in another State, he is thereby authorised to administer an oath to the party interrogated, whether his official station as notary authorised him or not. *Id.*

122. The plaintiff is bound by the admission of the party under whom he claims, when there is no fraud or collusion alleged by him. *Leefe v. Walker et al.*, 18 L. R. 1.

123. The rule that a party wishing to avail himself of the confessions made by the adverse party, cannot divide them and must take them entire, does not apply to the admissions made in the pleadings; but only to answers to interrogatories, or to judicial confession. *Diggs, Hobson & Co v. Parish et al.*, 18 L. R. 6.

124. Admissions in the answer are sufficient to dispense the plaintiff with proof of his demand; and the *onus probandi* lies on the defendant to establish his defence. He who pleads payment admits the existence of the debt, and must prove payment, or the plaintiff will have judgment. *Id.*

125. In an action for slander of title when the defendant reconvenes and sets up title it becomes essentially a petitory action, and the burden of proof of title rests on the defendant. *Millaudon et al. v. McDonough*, 18 L. R. 102.

126. The last warrantor is the real defendant in a suit against

his vendees, not only against the party who cites him, but more particularly against the original actor. *Millaudon et al. v. McDonough*, 18 L. R. 102.

127. Five days notice of the service of a rule is sufficient to bring the party into Court. *Monbouchet's curator v. Ferrand, fils*, 18 L. R. 372.

128. Where the capacity of a person, acting as executor, is not denied there is no necessity of producing the authority or evidence of capacity. *Cassidy v. his creditor*, 18 L. R. 402.

129. An attorney in fact, need not state that he knows the existence of a debt sworn to by him from his personal knowledge, when he is not questioned as to the manner in which he derives his knowledge. *Id.*

130. It is within the province of the Supreme Court to inquire into the manner in which the judge *a quo* exercised his legal discretion in acting on a case before him, whenever the party appears thereby to suffer an irreparable injury. *Girod's heirs and legatees v. Girod's executors*, 18 L. R. 394.

131. Where answers to interrogatories make out the plaintiff's case, and are not disproved, he will have judgment. *Beach et al. v. Oakey*, 18 L. R. 413.

132. It is irregular and illegal to set aside a judgment by default to permit dilatory exceptions to be filed; but the order setting aside such judgment cannot be treated as a nullity in order to render final judgment. It might be waived, and the exceptions considered; but the regular way is to rescind the order as improperly made. *Wilcox et al. v. Huie*, 18 L. R. 426.

133. Parties must enforce their rights in Courts of Justice according to the forms prescribed by law, or they will fail, however clear may be their rights. *Caldwell & Hickey v. Nolté et al.*, 18 L. R. 438.

134. So, an order on garnishees to pay money into Court obtained *ex parte* and without previous notice, cannot be enforced. *Id.*

135. A continuance will not be granted, because a public officer is called as a witness with his records at the moment of trial, and shows his books and documents are locked up, and his clerk has the key and is absent. *Slidell v. Locke*, 18 L. R. 461.

136. Where a judgment states the Court being satisfied that the defendant's claim is correct, it is a sufficient constitutional reason to support the validity of the judgment. *Id.*

137. Where a bill of exceptions taken to the charge of the judge to the jury, does not state any specific proposition on which the charge was predicated and objected to, this Court will assume that the judge *a quo* did his duty. *Bowman v. Ware*, 18 L. R. 597.

138. Signatures to the notes and checks sued on, are admitted by the plea of the general issue. *Beach & Co v. Wagner et al.*, 19 L. R. 86.

139. If the pleadings state the non-residence of the plaintiffs, their absence and right of their attorney to make affidavit for them, will be presumed, when the contrary is not alleged or shown. *Austin et al. v. Latham*, 19 L. R. 88.

140. It is entirely a discretionary power in the inferior Courts, to order a case to be sent before auditors, to facilitate the trial of causes by the investigation of accounts. *Guinault v. Lecarpentier*, 19 L. R. 239.

141. Where the verdict of a jury appears manifestly erroneous, the cause will be remanded for a new trial. *Id.*

142. When the judgment of the Court is confined to the points filed or raised in the argument of the case, it will not listen to an application for a re-hearing on other grounds, suggested after the case has been decided. *Caldwell et al. v. Western Marine and Fire Insurance Co.*, 19 L. R. 48.

143. Where the plaintiff failed to make out his case by full proof, the Court on consideration, set aside the non-suit and remanded the case for a new trial. *Barton's executrix v. Hemphkin*, 19 L. R. 517.

144. In a petitory action when the defendant exhibits the best title, he will be entitled to final judgment in his favor, and not merely one of non-suit. *Guidry v. Woods*, 19 L. R. 334.

145. It is not enough that a party renders his rights and claim probable in a Court of Justice; he must make them legally certain. *Skipwith v. his creditors*, 19 L. R. 198.

146. When all the promises and contracts are set out in the pleadings, if any one of them will authorize judgment, the Court should render it. Irrelevant or useless matter does not vitiate the good. *Rawle, etc. v. Skipwith et ux.*, 19 L. R. 207.

147. The party having the legal title may sue for the benefit of whom he pleases; in the same manner as he might dispose of the funds after judgment, if he sued in his one name. *Id.*

148. Where a case is dismissed on an exception *in limine litis*, the Supreme Court cannot examine it on its merits. It must be remanded for a *new trial*. *Id.*

149. Where the plaintiff makes that hardly probable, which he was bound to make certain, and where there is a verdict against him, he is not entitled to be relieved; but if the verdict is against the defendant, in such a case a new trial ought to be granted. *Barrett v. Bullard*, 19 L. R. 281.

150. Where the evidence does not support the charges in a physician's bill, the Court will give such judgment as may appear reasonable and equitable from the proof and circumstances of the case. *Lefevre v. Lastrapes*, 19 L. R. 353.

151. A slight variation in setting out the name of a corporation will not effect the right to maintain the action. *Canal Bank v. Fisher*, 19 L. R. 365.

152. Persons responsible for a trespass or injury in different ca-

pacities need not be joined in the same action, although if liable in the same way, all must be joined as in a joint action. *Cleveland v. Mayo et ux.*, 19 L. R. 414.

153. Where the *quantum* of damages is not proved or is left doubtful, the case will be remanded to ascertain them. *Riggs v. Duperrier et al.*, 19 L. R. 418.

154. After a judgment by default and answer to the merits, an exception denying the defendant's capacity to be sued as administratrix, is not admissible. *Cheevers v. Burke's administratrix*, 19 L. R. 429.

155. Where a case comes up on a judgment of non-suit in which there was no trial on the merits, or bill of exception taken, this Court cannot go into the merits. *Id.*

156. When a demand is afterwards set up for services growing out of a transaction already settled between the parties, for which no charge was made, and it is not shown the settlement was erroneous, it will be presumed the services were gratuitous. *Brownson v. Fenwick*, 19 L. R. 431.

PRESCRIPTION.

1. When it is shown that the defendant acknowledged the plaintiff's services were worth a certain sum, he cannot be allowed to plead prescription against any part of the claim. *Hoffman v. Atcheson et al.*, 13 L. R. 476.

2. Suit by a single creditor to annul a contract, on the ground of *undue preference* to another creditor, is prescribed by one year. *Caldwell et al. v. Atchafalaya Bank*, 14 L. R. 308.

3. But the revocatory action may be brought within the year by a creditor from the date of his judgment against his debtor, or by a syndic representing all the creditors, within a year from the date of his appointment, *to set aside all contracts* of the insolvent debtor by which creditors are *injured*. *Id.*

4. The wages of an overseer are prescribed after the lapse of three years from the time the services are rendered, notwithstanding they may have been continuous from the commencement to the time of instituting suit. *Cresap v. Winter*, 14 L. R. 553.

5. Where a suit is for six years wages of an overseer, prescription bars so much as has not accrued within the last year three years before bringing suit. *Id.*

6. The right of passage, and to use an open space in a town, as a public alley or street, is not acquired by prescription. *Grossman et al. v. Vignaud et al.*, 14 L. R. 173.

7. Where a party holds and possesses property honestly, and by virtue of a contract of a sale, regular in point of form, without notice of the plaintiff's claim, and having retained possession, pu-

blicly, without interruption, and in good faith, for more than *ten* years, he acquires a title by prescription. *Verret et al. v. Theriot*, 15 L. R. 106.

8. In whatever place the defendant may reside, the prescription of five years runs in his favor even against minors, and persons interdicted. *Tyson v. McGill*, 13 L. R. 145.

9. A conditional offer by defendant, in a conversation with the plaintiff's counsel, *that he would pay the note if long time enough was given*, does not amount to a new promise, so as to take the case out of prescription and entitle the plaintiff to recover. *Id.*

10. Prescription is an exception which does not touch the merits; and when this exception is overruled, the party should be heard on the merits. *Lang v. Kimball*, 15 L. R. 200.

11. Where prescription is first pleaded in the Supreme Court, and it is necessary to remand the case for a new trial on this plea, the party for whose benefit it is, must pay the costs of the appeal. *Parmelee & Baker v. Johnston*, 15 L. R. 429.

12. Prescription is interrupted by a suit in the United States Court sitting in another State. *Jackson v. Tiernan et al.*, 15 L. R. 485.

13. The plea of prescription should be explicit and special; so that the party against whom it is opposed may be put on his guard, in order to enable him to show that the prescription had been interrupted. *Blake v. Bredall*, 15 L. R. 550.

14. The possession of an usurper, or person under a defective *mesne* conveyance, and who is evicted, will not interrupt prescription, as against the rightful owner or proprietor, when they both claim under the same original title. *Dewall v. Choppin et al.*, 15 L. R. 566.

15. So, where the original possession was in good faith, although an intermediate possessor of the premises held in bad faith, the subsequent possessor in good faith can avail himself of the prescription applicable to such possession. *Id.*

16. If the possession has commenced in good faith, and it is afterwards held in bad faith, that will not prevent the prescription, even if the possessor's title was fraudulent, and he knew another person had a better title. *Id.*

17. To support the long prescription of thirty years, possession only, without title or good faith, is necessary; but continuous and uninterrupted possession under a legal title, derived from the original grantee, with certainty in the object, and good faith in the first and subsequent possessors, will support the prescription of ten years. *Id.*

18. Where the possession has not always been *a corporeal one*; but when it becomes necessary to complete a possession already begun, the civil possession will suffice. *Id.*

19. Where two confirmations of claims to land are of equal dignity, and one of them is regularly located and accompanied by

possession, and no steps taken by the other; the first will hold the land by the prescription of ten years. *Wilcoxon v. Rogers et ux.*, 16 L. R. 6.

20. If there is not a possession of five years with a title, legal and sufficient to transfer the property in a slave, the defendant cannot invoke prescription. *Cuny v. Robert et al.*, 16 L. R. 175.

21. The granting an order of seizure and sale, does not prevent the prescription of five or ten years, on the note or debt on which the order is founded. *Harrod v. Voorhies's administratrix*, 16 L. R. 254.

22. Privileged claims for work and materials furnished on a house are prescribed by the lapse of six months, if they are under five hundred dollars. *Taylor et al. v. Crain's administrator*, 16 L. R. 290.

23. Where it is established that the defendant has been judicially notified of the title or claim which is the foundation of the demand for the whole of the property or debt, so as to acquire a sufficient knowledge of the rights, sought to be enforced against him, there results a legal interruption of prescription in favor of those to whom such rights belong. *Flower et al. v. O'connor*, 17 L. R. 213.

24. So, where suit is brought on a promissory note by D. F., as surviving partner of the commercial firm of D. B. F. & Co., who was non-suited, yet it being for the whole amount of the claim or note, caused such an interruption in favor of the plaintiff's firm, as to destroy the defendant's plea of prescription. *Id.*

25. Although one cannot prescribe against his own title, he can prescribe beyond it: and claim more land than his title calls for, if he has had uninterrupted possession of the surplus a sufficient length of time. *Zeringue v. Harang's administrator*, 17 L. R. 349.

26. The prescription of actions against sheriffs for misfeasance and illegal acts of office, is extended by the act of 28th February, 1837, from one to two years from the day of the commission of the acts complained of. *Stinson, curator, etc. v. Buisson*, 17 L. R. 567.

27. The plea of prescription and of a discharge under a protestation that the debt was never due, do not amount to a waiver of the plea of the general issue. *L. & T. F. Shewell v. Raguet*, 17 L. R. 457.

28. In an action of debt on an account, the pleas of prescription and discharge under the insolvent laws of another State, do not amount to a waiver of the plea of the general issue. *Thomas Shewell v. Raguet*. 17 L. R. 459.

29. Evidence which is inadmissible to prove title may be received to show possession by known marks and boundaries, which is good to sustain the plea of prescription. *Broadway's heirs v. Pool*, 19 L. R. 258.

30. The plea of prescription may be filed or amended on the

trial, after the plaintiff has closed his evidence. It is a plea favored in law, and may emphatically be filed at any time. *Broadway's heirs v. Pool*, 19 L. R. 258.

31. The possessor of slaves under a just title, in good faith, will be protected by the prescription of five years. *Blanchard v. Castille*, 19 L. R. 362.

32. The plea of prescription of one year is not applicable to a workman's account, for work done by the job, and materials furnished, whether it be under a specific agreement or on a *quantum meruit*. *Ariail v. Fenwick*, 19 L. R. 413.

33. The action on a curator's bond against the sureties is not prescribed by the lapse of one year. It is an action arising *ex contractu*. *Brown v. Gunning's curatrix et al.*, 19 L. R. 462.

34. Actions to annul a sale, brought by a complaining creditor, for giving an undue preference to a portion of the creditors of the common debtor, are prescribed by the lapse of one year from the date of the sale. *Maurin & Co. v. Rouquer et al.*, 19 L. R. 594.

35. One who does not possess as owner, cannot acquire a title by prescription. *Wafer v. Pratt, sheriff, and another*, 1 R. R. 41.

36. Where a creditor, with a view to apply the proceeds of the settlement of his debt, receives from his debtor the conditional acceptance of a third person, who promises to pay on the recovery of a certain amount from a fourth: *held*, that the creditor having no direct action against such fourth person, has no other means of establishing his insolvency, than by prosecuting the acceptor; that until such insolvency is established, his right of action against the original debtor is suspended; that prescription will run in favor of the latter only from the period of the proof of such insolvency, and that the prescription of five years under art. 3505 of the Civil Code, will not apply to such a case. *Baird and others v. Livingston*, 1 R. R. 182.

37. The proprietor of the estate owing a servitude, is bound to fix the place where he wishes it to be exercised, and until he does so prescription for non-user will not run. *Delacroix v. Nolan*, 1 R. R. 321.

38. A designation in the act of sale, by the purchaser of an estate subject to a servitude of way, of the place for the exercise of the right, is a sufficient delivery of the way to support a plea of prescription for non-user. *Id.*

39. The provision of art. 786 of the Civil Code, that the time of prescription for non-user begins, as to interrupted servitudes, from the day when they ceased to be used, cannot be construed to prevent prescription where the servitude has never been used. If such a servitude be lost by non-user during a certain time, it will *a fortiori* be prescribed where it has never been used at all, for the extinguishment by non-user is founded on the presumed abandonment of the right by the person entitled to the servitude. *Id.*

40. Where the prescription of non-user is opposed to the owner

of the estate to whom the servitude is due, it is incumbent on him to prove that he, or some one in his name, has used the servitude, as appertaining to his estate, within the time necessary to establish such prescription. *Delacroix v. Nolan*, 1 R. R. 321.

41. The prescription of five years, established by the act passed the 10th of March, 1834, and promulgated the 28th of April following, in favor of purchasers at public sales, runs from the day of sale; but where the sale was made before the passage of the act, prescription must be reckoned from the day of its promulgation. *Bourg and others v. Bouginot and others*, 1 R. R. 331.

42. A renunciation of prescription may be proved on the trial, though not alleged in the petition. Such an allegation is unnecessary, for the plaintiff cannot know that prescription will be pleaded in the answer. *Second v. Landry*, 1 R. R. 335.

43. Waiver of prescription may be proved by one witness, where the amount of the obligation is under five hundred dollars. *Id.*

44. The English text of art. 3423 of the Civil Code, is an incorrect translation of the original French. The French text is copied *verbatim* from art. 2220 of the Code Napoléon; and means only, that no renunciation can be made, at the time of entering into a contract, of the right of pleading a prescription which may be thereafter acquired. It does not prohibit the renunciation of the benefit of time already elapsed; to prevent prescription from being accomplished, which is but an interruption of prescription such as would result from an acknowledgment of the debt. But no stipulation can be made to prevent its running anew, the moment after such interruption. *Id.*

45. Prescription cannot avail one not in possession. *Hart and others v. Foley*, 1 R. R. 378.

46. Defendant being in possession, no prescription can bar his right to contest the validity of the title under which the plaintiff claims. *Id.*

47. Art. 3499 of the Civil Code, which prescribes the action of workmen and laborers for their wages after one year, does not apply to an action by workmen, for specific work, done under a written contract. *Townsend and another v. Caldwell*, 1 R. R. 433.

48. Attachment by plaintiff of goods belonging to defendant, in the hands of third persons, who were made garnishees. The latter delivered up the goods, except a part retained to secure an amount due to them, as agents of a ship, for freight of the whole lot. A rule having been obtained by the plaintiffs on the garnishees, to show cause why they should not deliver up the goods retained, the latter suffered it to be made absolute, without objection, and on execution, surrendered the balance of the goods to the sheriff. On a subsequent rule by the owners of the ship, against the plaintiffs, defendant, and sheriff, to show cause why the freight of the whole lot of goods, should not be paid by preference out of the balance last surrendered by the garnishees: *held*, that the defendant, though

without interest in the question of privilege, as between the plaintiffs and the owners of the ship, is interested in defeating the claim of the latter, and may plead prescription against it; that no prescription could run so long as any of the property remained in the hands of the agents of the ship owners, as a pledge for the payment of the freight, such pledge being a standing acknowledgment of the debt; and that it commenced running only from the delivery of the goods to the sheriff, from which time the owners of the ship had fifteen days to assert their privilege for the freight, and one year to urge their claim against the debtor. *Wilson v. Bannen*, 1 R. R. 556.

49. Prescription is interrupted, wherever the debtor, or possessor acknowledges the debt, or adverse right, against which it was running. *Id.*

50. Parole evidence is admissible to sustain a plea of prescription, by establishing possession, its character, and other requisites to sustain the plea; or to disprove it, by showing that the party did not possess as owner, or had renounced the benefit of prescription. *Kittridge v. Landry*, 2 R. R. 72. *Kittridge v. Dugas*, 2 R. R. 85.

51. Action against defendant as drawer of certain notes and endorser of others. Plea of prescription, and proof of promise by defendant, within the time necessary to prescribe, to give his notes for the debt, payable at a short time; but no evidence of notice of the protest of the notes on which he was endorser, nor that he was aware of his discharge at the time of the promise: *held*, that defendant was bound for the notes of which he was drawer, but discharged as to those on which he was endorser. To render promises to pay binding on an endorser who has been discharged, it must be proved that he was aware of his discharge, at the time of the promise. *Tomes v. Montanye*, 2 R. R. 158.

52. An action to rescind a contract of sale or pledge made by an insolvent, on the ground of its having been executed with intent to give a preference to certain creditors, is prescribed by one year. C. C. 1982. *Robinson v. Shelton*, 2 R. R. 277.

53. Under the act of 10th of March, 1834, all formalities connected with any public sale by a Parish Judge, sheriff, auctioneer, or other public officer, are prescribed by the lapse of five years. *Drouet v. Rice*, 2 R. R. 374.

54. A purchaser who shows a judgment, execution and sale, under which he holds, has a title sufficient to acquire by the prescription of ten and twenty years; and no informalities in the sale can affect his title, when he has possessed under it the time required by law to acquire the property by prescription, before such informalities were set up. *Walden v. Canfield*, 2 R. R. 466.

55. One who left the State to discharge the duties of a senator of the United States, and who, on resigning, was made a member of the President's cabinet, and subsequently a foreign minister,

will not be considered as having lost his domicile in this State, where no act has been done evincing any intention to acquire a new domicile (C. C. 46); and prescription will run against him, as if actually within the State. *Walden v. Canfield*, 2 R. R. 466.

56. The general doctrines relative to the interruption of prescription, do not apply to the period fixed by art. 593 of the Code of Practice, after which no appeal will lie. No appeal can be taken after the expiration of that time, though one may have been dismissed, which was taken within the period. *Griffing and others, heirs v. Bowmar*, 3 R. R. 113.

57. To support the prescription of ten years, the title to the immoveable must be apparently good, and of a character to induce the belief, on the part of the possessor, that it is perfect. A title, defective on its face, will not be sufficient; *aliter*, where the defect proceeds from circumstances or evidence *dehors* the instrument. *Eastman v. Beiller*, 3 R. R. 220.

58. Where one assumes to sell without title, or without disclosing the defects in his title, the vendee, in good faith, though holding *a non domino*, may plead the prescription of ten years. Otherwise, where vendor sells only his right or interest, shows what it is, and declines to warrant generally, thus bringing home to the vendee a knowledge of his title. *Id.*

59. Under the act of 28th February, 1837, actions against the sureties of a sheriff on his official bond, are prescribed by the lapse of two years. *Mulhollam v. Henderson*, 3 R. R. 296.

60. An action for the nullity or rescission of partitions, is prescribed by five years. C. C. 3507. *Tippett v. Jett*, 3 R. R. 313.

61. Where a note secured by mortgage, is prescribed, the mortgage is necessarily extinguished. A mortgage can only exist as an accessory to a principal obligation, with the extinction of which it disappears. C. C. 3251, 3252, 3374. *Auguste v. Renard*, 3 R. R. 389.

PRINCIPAL AND AGENT.

1. Where the defendant, representing himself as agent, induces the plaintiffs to purchase an assorted cargo for his principals, which is shipped in their vessel, invoices made out for their account and risk, and a bill drawn on *them* by the plaintiffs for the amount, which is accepted but not paid: *held*, that the agent is not liable. *Zacharie et al. v. Nash*, 13 L. R. 20.

2. A person who draws a bill of exchange, declaring himself at the same time to be the *agent of the drawees*, is not liable, individually, in case of non-payment. *Id.*

3. Where the principal, residing in France, draws on her agent in this State, to pay over a certain sum of money to a third person,

with the *usual* interest, it amounts to nothing more on her part, than a promise to pay the amount, with interest, at the place where the draft is payable. *Poydras v. Delamare*, 13 L. R. 98.

4. On the refusal of the agent to pay the order of his principal, the latter is alone bound, and is not entitled to notice on such refusal. *Id.*

5. The agent having funds of his principal in his hands, and refusing to pay them over to the payee of his principal, is not individually bound. The neglect of the agent to obey the directions of his principal does not render him liable to a third person. *Id.*

6. Where an agent with general and special powers is instructed to purchase three hundred hogsheads of tobacco for the London market, and without additional authority he ships ninety-nine hogsheads to New-York, on which a loss is sustained, he is answerable therefor. *Vigers et al. v. Kilshaw*, 13 L. R. 438.

7. So, where an agent acts in faith, but indiscreetly, and exceeds his instructions, he will be responsible to his principal for the loss sustained, or that results from his unauthorised acts. *Id.*

8. An agent receiving drafts, and engaging to make title as soon as he has collected them, undertakes to present them for payment and account to the other party for them, or show that one or more of them remained unpaid before he is exonerated from his obligation. *McAllister v. Srodes*, 14 L. R. 442.

9. An agent is bound to administer proof of his performance of the obligation resulting from his agency. *Id.*

10. The liability of corporations, is the same as natural persons, for the acts and neglect of their agents, when acting within the scope of their employment. *Ware, f. m. c. v. Barataria and Lafourche Canal Co.*, 15 L. R. 169.

11. Masters and employers are responsible for the damage occasioned by their servants and overseers, in the exercise of their functions; but this liability only extends to cases where the master or employer might have prevented the act which caused the damage, and did not. *Id.*

12. So, where a lock-keeper, instead of attending to his duties assaults and causes damage to a passenger, even under pretext that the latter has not paid his toll, he alone is responsible for the damage, and not his employer. *Id.*

13. Where an agent is employed to buy a quantity of fish, in barrels, with discretionary powers to do the best he can in executing the order, and he procures fish which have passed inspection, but, in consequence of the barrels not retaining the brine, the greater part of the fish are spoiled on the arrival, and sold at great loss: *held*, that this is not such a degree of negligence on the part of the agent as will authorize a recovery in damages. *Forstall et al. v. Fowle*, 15 L. R. 299.

14. A party to a contract, who denies that he acted as principal, must show that he made this known at that time of the contract,

or allege and prove his agency at the trial. *Nott & Co. v. Papet et al.*, 15 L. R. 306.

15. A judgment of the Probate Court unappealed from, appointing the plaintiff agent, with power to collect the debts of a partnership, is full authority for him to sue and recover all accounts and debts due to the firm. *Brent, agent, etc. v. Cheevers*, 16 L. R. 23.

16. An agent may possess for his principal, and his possession is sufficient to maintain the possessory action. *Arden v. Soileau*, 16 L. R. 28.

17. An authority to an agent or attorney at law to collect a debt does not authorize him to novate it, or enter into a compromise. *Dupré v. Splane*, 16 L. R. 51.

18. But where an agent, in the honest exercise of his judgment, makes an unauthorised settlement by receiving part of a debt in cash, and the note of another person for the balance, and apprizes his principal, the latter must disapprove of it in a reasonable time, or his silence will be considered an approval. *Id.*

19. The principal must make his election. He cannot hold his agent liable, and at the same time avail himself of his acts, if they should be advantageous. *Id.*

20. So, where the agent had a note to collect, and not being able to get all in money, and fearing the insolvency of the debtor, took a note on another person for the balance which was not paid, but of which he advised his principal, who made no objection at the time: *held*, that the agent was not bound for the loss. *Id.*

21. A promise to pay certain drafts by the defendant, who avers that he drew them as agent, will bind him personally, and authorize the drawee who has paid the drafts, to recover the amount from him. The case is stronger when the principal disavows the acts of his alleged agent. *Linton's heirs v. Walsh*, 16 L. R. 113.

22. Where A. authorized B. against whom he had a judgment, to deliver his draft for its amount to the clerk of the Court, and the latter gave his draft payable to the order of the clerk, who appropriated it to his own use: *held*, that he should have made it payable to the order of A. for whom it was given, and not to have put it in the power of the clerk to use it, and that having done so he was still liable to pay the amount of the judgment to A. *Wells v. Gordon*, 16 L. R. 219.

23. When an agent or attorney undertakes to collect a debt in a distant place, and makes known to his principal the mode of conveyance by which the note or evidence of the debt will be sent, who does not disapprove of it, he will not be responsible for an accident that may happen and prevent its safe arrival, without his fault. *Delavigne, syndic v. City Bank of New-Orleans*, 16 L. R. 471.

24. A Bank taking a note for collection, becomes the mandatory or agent of the holder or depositor only; there is no privity between

it and any of the other endorsers, or parties to the note. Its responsibility is only to those who employ it. *McCulloch v. Commercial Bank*, 16 L. R. 566.

25. So, where a note is deposited for collection, and the notary of the Bank fails to give notice of protest to the first endorser, who is thereby discharged; the second endorser, who takes up the note, has no recourse against the Bank. *Id.*

26. Between principal and agent, wherever the former can identify his property, or its proceeds, in the hands of his factor or agent, he is entitled to recover it, *Stetson, Avery & Co. v. Gurney; Robertson, intervenor*, 17 L. R. 162.

27. But money, the mere representative of value, cannot be identified and reclaimed as goods or property. When money is advanced to an agent to be employed in the purchase of cotton, &c., the latter becomes indebted for that amount and the relation of debtor and creditor exists between them. *Id.*

28. So, where R. advanced money to G. a broker, to buy cotton, and the latter deposited the money in Bank to his own credit which was in part seized by one of his judgment creditors: *held*, that it was rightfully seized, money deposited in Bank cannot be identified and is in fact a debt due the depositor by the Bank. *Id.*

29. An agent interested only to the amount of his commissions is a competent witness for his principal; but when his interest is distinct and not growing out of his agency he is incompetent. *Id.*

30. An agent who sells goods or property of his principal and takes a note to his own order, which is protested at maturity and he uses no legal means or diligence to enforce or secure payment, he makes the debt his own and is liable to his principal for its amount. *Kinney v. Crane*, 17 L. R. 417.

31. A Bank employing their notary to protest a note deposited with them for collection, is not liable for the official misconduct or failure of the notary to give notice to the endorser by which they are discharged. *Hyde & Goodrich v. Planters's Bank of Mississippi*, 17 L. R. 560.

32. So, where the defendant gave a note, deposited with them for collection to their notary, who failed to make a record of his protest and notice to the endorser by which the latter was discharged: *held*, that the notary and his sureties, and not the Bank are liable. *Id.*

33. Where the notary states he demanded payment of F. E., *the attorney in fact of the drawer*, the notary's statement is no evidence of the agency. It should be proved on the trial like any other fact. *Fortier v. Field*, 17 L. R. 587.

34. A party chartering a vessel is bound to the owners; and the captain as their agent, has a right to retain the whole amount of the hire out of the cargo, whether the adventure was joint, or entirely owned by this party. *Leefe v. Walker et al.*, 18 L. R. 1.

35. An agent who speculates on the purchase made for his prin-

principal by management to get the article cheap, and charges the market price, is not acting in good faith. *Dwyer v. Powell*, 18 L. R. 99.

36. The practice of agents charging their principals more than they pay for an article purchased by them, is illegal and should be discountenanced. *Id.*

37. Where agents sold property on short time for notes which were not paid in full, but an extension of time given on renewal, with small payments and interest included, all of which was communicated to the principals, who made no objection, until more than seven months afterwards: *held*, that the agents were not responsible for the balance due on the transaction. *Starr & Howland v. Zacharie & Co.*, 18 L. R. 517.

38. The principal must disapprove the note of his agents within a reasonable time; otherwise he is bound by *their acts*, done in good faith. *Id.*

39. If a person acts merely as agent of his brother-in-law, at the sale of his own property, and in superintending it afterwards, he will not be considered as interested, or his acts viewed as an interference with the property, or an exercise of ownership over it. *Vaughan v. Western Marine and Fire Insurance Co.*, 19 L. R. 54.

40. Where the agreement leaves it doubtful whether the agent was entitled to commissions on certain notes received in payment, or only on *monies* received, and the jury find a verdict in the affirmative it will not be disturbed. *Vignié v. Saulet*, 19 L. R. 23.

41. So, where it appeared the defendant gave orders to the intervenors to ship his cotton in their names, it was held that the legal possession and control over it remained in him, as owner, through the interposition of these persons, *as his agents*. *Hamer & Co. v. Lawrence et al.*, 19 L. R. 58.

42. An agent to purchase slaves cannot buy from himself, or put one of his own slaves in so as to charge the principal with his price, or value; and where there was deception inducing him to settle with the agent he will recover back the price, as having been allowed in error. *Brownson v. Fenwick*, 19 L. R. 431.

PRINCIPAL AND SURETY.

1. The surety cannot require the creditor to sue the principal debtor before resorting to him for payment. His remedy is to pay the debt, and exercise the rights of the creditor against the debtor, to which he is subrogated by the payment; or proceed under article 2026 of the Louisiana Code. *Boutte, f. m. c. v. Martin et al.*, 16 L. R. 133.

2. A verbal agreement to wait until the debtor can go to a cer-

tain place to procure money, with which to pay the debt, is not such a prolongation of time as will discharge the surety. *Boutte, f. m. c. v. Martin et al.*, 16 L. R. 133.

3. The plaintiff cannot have a case in this Court continued for a *certiorari* as to the principal debtor, and proceed to final judgment against the sureties, who are his co-defendants. *Griffing's administratrix v. Caldwell et al.*, 16 L. R. 294.

4. Sureties have an interest that judgment be first rendered against the principal debtor, or at least simultaneously with them. *Id.*

5. The surety who has paid defendant's notes in the hands of a third person without notice of the defence set up, will recover the amount he has paid notwithstanding the eviction and loss of title to the property for which the notes were given. *Gasquet v. Oakey*, 19 L. R. 76.

6. The surety in an attachment bond need not be owner of real estate or a free-holder; so that he is solvent and resides within the jurisdiction of the Court, it is sufficient. *Austin et al. v. Lathane*, 19 L. R. 88.

7. In an action on a joint obligation, when it is shown, two of the parties signed as sureties of the third, any payments made by the principal debtor will be imputed and go to the extinguishment of the debt, and judgment given for the balance, against the principal and sureties *in solido*. *Brander et al. v. Garrett et al.*, 19 L. R. 455.

8. In a suit on a *joint note*, where it is shown the defendant signed as surety for the other maker; although the obligation be *joint only in its form*, yet the surety is bound for the whole debt, or liable *in solido*. *Roberts & Crain v. Jenkins*, 19 L. R. 453.

9. The obligation entered into by the principal and his surety, is not a joint one; but on the contrary, each one is bound towards the creditor for the whole, although as between themselves, the entire debt or sum is due by the principal, and can be recovered of him by the surety who pays. *Bonny & Baker v. Brashear*, 19 L. R. 383.

10. A surety may be sued without his principal. *Id.*

11. Where the curator fails to comply with his duties, and pay over money, any creditor of the estate may at once resort to his action on the curator's bond against the surety. *Id.*

12. The surety cannot appeal from a judgment against him and his principal, which the latter has already had reversed on appeal. The release of the principal in the judgment, released the surety, although not a party to that appeal. *Brashear v. Carlin, curator, &c.*, 19 L. R. 395.

12. The obligation of the surety in a curator's bond is that the principal will administer the estate according to law; and his duty requires him to pay all the creditors equally according to their rank. *Brown v. Gunning's curatrix et al.*, 19 L. R. 462.

14. Judicial sureties are bound *in solido*; so each surety in a

curator's bond is liable to the action of the creditors of the estate, for the whole amount claimed. *Brown v. Gunning's curatrix, et al.*, 19 L. R. 462.

15. Sureties in bonds taken in judicial proceedings are bound *in solido*; being entitled to neither division nor discussion; so several sureties in a twelve months bond are each bound for the whole sum. *Woodburn v. Friend et al.*, 19 L. R. 496.

PRISON BONDS.

1. To preserve his recourse upon the surety in a bond to keep the prison bounds, the plaintiff must so conduct his proceedings as to be at all times able to subrogate the former, to all his rights and privileges against the debtor. *Comstock v. Créon*, 1 R. R. 528.

2. A debtor arrested on a *capias ad satisfaciendum*, having given security to keep the prison limits, the plaintiff, on discovering property, took out a *fieri facias*, and seized it, whereupon, the debtor made a voluntary surrender for the benefit of his creditors, which was accepted by the judge, and on the same day broke the limits, when, all proceedings having been arrested, the *fieri facias* was returned. On the opposition of plaintiff, the surrender was rejected; and the latter, having abandoned his *fieri facias*, sued the surety on his bond. *Held*, that the *fieri facias* was legally issued, and gave a lien on the property; that the surrender having been set aside, the plaintiff might have proceeded to make his money; and that by neglecting to do so, the surety was released. *Id.*

PRIVILEGE.

1. According to the provisions of the Louisiana Code art. 3216 No. 3, those who have furnished the owners with materials for the construction or repair of an edifice, are entitled to a privilege on the building or work constructed, for the price of such materials. *Andry v. Guyol et al.*, 13 L. R. 8.

2. So, where the vendee of a lot of ground received materials from a third person for the erection of a house on it: *held*, that the material man is entitled to receive the price of the materials furnished, by *privilege*, over the vendor of the lot, to be paid from the price of the house in the hands of the sheriff, which was sold with the lot. *Id.*

3. Mismanagement, or failure to pay over money received, gives no privilege upon the property of an agent. *Whatley v. Austin, administrator*, 1 R. R. 21.

4. Privileges are only allowed where the law expressly accord them. *Id.*

5. The privilege of a depositor is only upon the price of the thing deposited, when it has been sold. *Id.*

6. Where a factor who has received instructions to pay a debt out of the proceeds of property consigned to him for sale, for the purpose of preventing an attachment, advances the amount, and pays the debt before any attachment is levied, his privilege for such advance on the property consigned will be superior to that acquired by a subsequent attachment. *Hundley v. Spencer and another*, 1 R. R. 209.

7. Privileges do not necessarily exist without registry; most privileges now existing by law, are required to be recorded, to operate against third persons. *City Bank of New-Orleans v. Huie*, 1 R. R. 236.

8. Assessments made under the act of 2d April, 1832, regulating the opening and improvement of streets and public places in the city of New-Orleans, are privileged as to third persons, only from the time of inscription in the office of the recorder of mortgages. *Id.*

9. A steamer having been seized and advertised for sale by the marshal of the City Court of New-Orleans, under several executions issued on judgments obtained in that Court and in the Courts of the associate judges, a creditor who had obtained a judgment against the boat in the District Court of the United States, paid to the marshal the full amount of all the executions in his hands, with the costs, in order to release it from seizure, and place it in the possession of the marshal of the United States under his judgment, notifying the marshal of the City Court at the time, that his claim on the boat was a privilege of a higher order than those of the judgment creditors at whose suit it was seized. On a rule by one of the latter to show cause why his claim should not be paid by privilege out of the funds in the hands of the City marshal, the creditor who had obtained a judgment in the United States Court having intervened, and claimed to be paid by preference over all the other creditors: *held*, that the boat not having been sold, and the payment to the city marshal having been made avowedly to release it from seizure, and to enable the marshal of the United States to take possession and sell, thus depriving the original seizing creditors of their recourse against the boat, the payment to the city marshal must be regarded as a satisfaction of the executions in his hands, and the amount be distributed among the several seizing creditors in proportion to their respective judgments. *Buckley v. McCloskey and others*, 1 R. R. 312.

10. A clerk has a general privilege on all the property of his employer. A sale accompanied by delivery, destroys this privilege; not so on attachment. The property attached belongs to the original owner, until divested by a sale; and the privilege of a clerk, will entitle him to be paid in preference to the attaching creditor. *Tiernan v. Murrah and another*, 1 R. R. 443.

11. The right of the lessor over the products of the estate, or

the moveables on the place leased, is of a higher nature than mere privilege. The latter is enforced only on the price of the moveables to which it applies; it does not enable the creditor to take or to keep the effects themselves. The lessor, on the contrary, has a right of pledge on them; and may seize and retain them, until he is paid. *Garretson v. his creditors*, 1 R. R. 445.

12. The privilege of the lessor on the products of the estate, or on the moveables on the place leased, has a preference over all other privileged debts, such as expenses of the last illness, law charges, and others having a general privilege on the moveables. The charges for selling the moveables subject to the lessor's privilege, must be paid before the rent, as they are necessary to procure the means of paying it; and so of the funeral expenses of the debtor and his family, where there is no other source from which they can be paid. *Id.*

13. Where the amount applicable to the payment of the law charges privileged against the estate of an insolvent, is insufficient to pay the whole, they must be paid *pro rata*. *Id.*

14. A ship owner may retain all the goods shipped, until the whole freight bill is paid. Every part of the goods is liable for the whole debt, where a part only of the goods shipped have been retained as security, it will be liable for the whole freight. *Wilson v. Bannen*, 1 R. R. 556.

15. Ships and other vessels are not susceptible of being mortgaged, except according to the laws and usages of commerce. The validity of an hypothecation of them will not be recognized in any other cases; and there is no distinction in this respect between vessels trading with foreign ports, and those which do not leave the State. *Hill v. Phoenix Tow Boat Company*, 2 R. R. 35. *Hill v. De Lizardi*, 2 R. R. 89.

16. Advances made to the owner, and applied to the use of a vessel, confer no privilege on the creditor. Such a claim is not embraced in any of the classes provided for by article 3204 of the Civil Code enumerating the debts privileged against ships or other vessels. The creditor is not subrogated to the rights of those whose privileged claims may have been paid out of the money advanced by him. *Hill v. Phoenix Tow Boat Company*, 2 R. R. 35.

17. Builders who contract with tenants for alterations or repairs of the premises leased, have no lien or privilege on the premises. There is no privity between the builder and the owner. *Sewall v. Duplessis*, 2 R. R. 66.

18. Art. 2697 of the Civil Code, which declares that a lessee may remove the improvements and additions he has made to the thing let, provided he leave it in the state in which he received it, cannot be extended by implication to builders who contract with such lessees. Such contractors must be considered as having done the work on the personal credit of the lessee; and they have no right

to remove the materials used in such repairs and improvements, on the ground that they have not been paid for. *Id.*

19. Plaintiffs attached certain cotton as the property of defendants. Proof that it had been previously sold by defendants to intervenor, who had given a note for the price, which was protested at maturity, and still unpaid. The sheriff's return showed that he had attached seventy bales of cotton, which was subsequently released on the execution of a bond by the consignees. Urged, on behalf of plaintiffs, that though the attachment could not hold the cotton, it was good, as to defendants' privilege as vendors. *Held*, that the return showed that no such right had been attached; and that the lien, if any existed, attached to the cotton, which had been sold. *Slocumb v. Real Estate Bank of Arkansas*, 2 R. R. 92.

20. A third person, not a creditor, having advanced money to defendants, at an usurious interest, on certain articles held as security for its re-payment, which advances were applied to the benefit of the creditors of the latter, on a seizure by plaintiffs under an execution, against defendants: *held*, that such third person ought to lose the usurious interest exacted by him; and that the difference between the sum advanced and the real value of the articles, is all that was liable to seizure. *Taylor v. Whittemore*, 2 R. R. 99.

21. The act of the 28th February, 1831, authorising the Police Juries of *Pointe Coupée* and certain other Parishes, to cause the necessary work to be done to the roads, levees, bridges, etc., in those Parishes, gave a summary remedy to the undertaker employed by the Police Jury, and extraordinary powers to the Parish Judge to issue orders of seizure and sale for any amount in such cases. But where, from any informality in the proceedings, such summary process cannot be issued, the Police Jury may nevertheless recover, *via ordinaria*, from the proprietor of the estate, at least so far as such work has been advantageous to him, the cost of works which both his interest and the general safety required to be executed. But such recovery cannot be had under proceedings before the Parish Judge, commencing with an order of seizure and sale under the act of 1831, by changing the executory into ordinary process, the Parish Judge having no jurisdiction of the question presented in an action *via ordinaria*. *Police Jury of Pointe-Coupée v. Gardiner*, 2 R. R. 139.

22. Section 4 of art. 3216 of the Civil Code, gives a privilege on the land for improvements to the levees, bridges, roads, &c., not only to one who has made such improvements by contract or job, but to any one who has applied his own labor to that purpose under the authority of the police regulations; and where work has been done, which the regulations of police require the owner himself to perform, and by which the land has been rendered more valuable, the land itself will be affected by the privilege, which, if recorded in the proper office, will pass with it into the hands of third persons. Where the work has been regularly adjudicated and

done by the job, the amount for which a privilege exists, is liquidated; otherwise, it must depend on the proof of its utility to the proprietor; and in an action on a *quantum meruit*, evidence will be admissible to show the increased value of the land. *Police Jury of Pointe Coupée v. Gardiner*, 2 R. R. 139.

23. The rights of a creditor claiming a privilege on property in the hands of a judicial sequestrator, cannot be determined without making such creditor a party to the suit. The judicial sequestrator does not represent him. *Bank of Alabama v. Hozey*, 2 R. R. 150.

24. A sequestration, whether conventional or judicial, creates no lien or privilege. It is merely a conservative measure. The possession of the sequestrator is that of the party legally entitled to it; and in all cases the party against whom it has been obtained, may release the property, by giving bond with surety. *Id.*

25. No privilege or lien is created on the fees of office due to a sheriff by his official defalcations. The debts due to him, on whatever account, form, together with his other property, a common fund, out of which all his creditors are to be paid. *Id.*

26. The owners of notes executed each for a portion of the price of property, and secured by the same mortgage, are entitled to be paid out of the proceeds of the property, in proportion to the amount of the notes owned by them respectively. *Salzman v. his creditors*, 2 R. R. 241.

27. Under the Code of 1808, book 3, title 19, art. 77, the vendor's privilege was postponed to the law charges in general. By the new Code, the vendor is paid out of the proceeds, of the thing sold, before other privileged claims, except the charges for affixing seals, for making inventories, and others necessary to procure the sale of the thing. C. C. 3234. *Monrose v. his creditors*, 2 R. R. 280. *Lauve v. his creditors*, 2 R. R. 527.

28. The claim of a consignee, for advances, is superior to that of an attaching creditor, where the former had received a bill of lading previous to the attachment. But proof of such advances will not defeat the attachment of the latter, who will be entitled to any surplus after payment of the advances and necessary expenses. *Park v. Porter*, 2 R. R. 342.

29. The privilege of the lessor on the moveables found in the house, yields only to that for the funeral expenses of the debtor and his family, and to that only when there is no other source from which it can be paid. The charges for selling the moveables, which, under art. 3223 of the Civil Code, are to be paid before the rent, are those only which are necessary or incidental to the sale of the moveables. *Montilly v. his creditors*, 2 R. R. 350.

30. Under art. 722 of the Code of Practice, the creditor acquires, by the mere act of seizure, a privilege on the immoveable or moveable property seized, which entitles him to a preference over other creditors, unless the debtor has been declared a bankrupt.

previous thereto. If the seizure created a privilege only where the property of the debtor was sufficient to pay all his debts, it would only attach when it would be useless. *Campbell v. his creditors*, 3 R. R. 106.

31. Article 301 of the Code of Practice, which declares that the sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the sale of the property seized, if a third person oppose such payment alleging that the defendant has no other property to pay his debts, and pray that the proceeds may be brought into Court, to be distributed among all the creditors of the defendant, according to the order of their respective privileges or hypothecations, makes a provision in favor of the creditors who have a higher privilege than that of the seizing creditor. It directs the proceeds to be divided among the creditors according to their respective *privileges* and hypothecations, including the privilege obtained by the seizure. *Id.*

32. One who has ceased to act as overseer, but continues his services as an agent for the owners of a plantation, has no privilege on the crop for his services in the latter capacity. *Succession of Johnson*, 3 R. R. 216.

33. An overseer whose services have continued for one year and for a part of a second, has, under art. 3184 of the Civil Code §1, a privilege on the crops of both years, or on either, for the whole amount due him. His privilege on the crop of the past year, may be exercised upon its proceeds, even after it has been sold; but as to the growing crop, his privilege is confined to the crop itself. *Id.*

34. The holder of notes given for the price of a tract of land, though not identified with the sale by the *Paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be identified. Their identity may be proved by his oath. *Id.*

35. Where the vendors of slaves have left them for a number of years in the possession of the vendee, without taking any steps to preserve their privilege, they cannot assert it to the prejudice of creditors who have obtained judgments against him, or received special mortgages from him. C. C. 3238. *Blackstone v. his creditors*, 3 R. R. 219.

36. A wife has a privilege on the moveables of her husband, for her dotal, but not for her paraphernal property. For the latter, she has only a tacit or legal mortgage, on his immoveables. C. C. 2367, 3182. *Strafford v. Dunwoodie*, 3 R. R. 276.

37. Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she obtained a judgment against her husband, in a suit for separation of property, and, in virtue thereof, caused the moveable property, previously seized by defendant, to be sold, and purchased it herself, crediting the amount upon her judgment. On a motion to discharge the injunction: *held*, that by

his seizure defendant had acquired a privilege on the moveables seized; that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Strafford v. Dunwoodie*, 3 R. R. 276.

38. Article 3499 of the Civil Code does not apply to shipwrights who undertake to build or repair ships or other vessels, whether under a contract for a stipulated sum, or otherwise. It applies only to the claims of workmen or laborers for their daily or monthly wages, and to the sellers of materials for the price thereof, against the person with whom they contract directly, whether the owner or undertaker. *Harrod v. Woodruff*, 3 R. R. 335.

39. Where plaintiff in an action commenced by attachment, has obtained a judgment before defendant's application to be declared a bankrupt under the act of Congress of 1841, he will be entitled to a preference on the property attached. *Aliter*, where defendant's application was made before judgment. In the last case no privilege is acquired. *Fisher v. Vose*, 3 R. R. 457.

PRIVILEGE AND MORTGAGE.

1. No mortgage or privilege can be established or extended by analogy to similar cases where it is allowed by law. It is only given by express law. *Hoffman v. Laurans et al.*, 18 L. R. 70.

PROHIBITION.

1. A writ of prohibition will not be granted, prohibiting the judge *a quo* from proceeding to try a cause on the merits, while an appeal is pending from a judgment dissolving an injunction on a matter purely incidental to the main action. *State v. Judge of the First District Court*, 17 L. R. 511.

2. A prohibition is not a writ of right, but the Court may grant it on such conditions as will secure to the party who may suffer by it, sufficient indemnity for the trouble, delay and losses he may unjustly sustain. *State of Louisiana v. Judge of the First District*, 19 L. R. 167.

3. An oath is not required to a petition for a writ of prohibition, if the truth of the facts stated in it appear from an inspection of the record and proceedings had in the case. *State of Louisiana v. Judge of the First District*, 19 L. R. 174.

4. Where by error the judge *a quo* refuses to allow a suspensive appeal, a writ of prohibition is the proper remedy to correct such error. *Id.*

5. A writ of prohibition may issue to suspend the action of an inferior tribunal for a time, and until it legally resumes the exercise of its former jurisdiction. *State of Louisiana v. Judge of the First District*, 19 L. R. 174.

6. The judge of an inferior Court cannot grant an order of seizure and sale after an appeal is taken from *his refusal* to issue the same order, previously applied for. But if *he does*, the proper remedy to arrest his proceedings is by writ of prohibition. *Id.*

7. The authority to grant writs of prohibition is considered in relation to the constitution, which allows to this Court appellate jurisdiction only, and is to be confined to matters which have a tendency to aid that jurisdiction. *Id.*

8. The right of inquiring into the sufficiency of the surety on an appeal bond, and of deciding whether the appeal shall be suspensive or devolutive, is exclusively within the province of the Court from which the appeal is taken. The sufficiency of the security may be tried, on motion; and, if an error be committed by the Court in refusing to make the appeal suspensive and authorising the issuing of execution, the remedy is by a writ of prohibition. *Stanton v. Parker*, 2 R. R. 550.

9. Plaintiffs having issued execution against defendants, took a rule on the latter to show cause why they should not be ordered to produce their books, that plaintiffs might inspect them. The rule was made absolute, and the sheriff ordered to seize the books. On an application by defendants for a writ of prohibition: *held*, that if they had sustained or apprehended irreparable injury, their remedy was by appeal. *State v. Judge of Commercial Court*, 2 R. R. 566.

PROVISIONAL SEIZURE.

1. Plaintiff having obtained a writ of provisional seizure, caused it to be levied on a debt due to defendant by a third person, which the sheriff, without any order of Court, released, on the execution of a bond by the defendant, with security, for the restoration of the property, and satisfaction of any judgment which the plaintiff might obtain. The bond was assigned to the plaintiff, but no evidence offered to prove that he accepted the assignment. *Held*, that the release was illegal, and the sheriff is responsible to the plaintiff for the amount of the seizure. *Fernandez v. McVittie*, 2 R. R. 239.

PUBLIC LANDS OF THE UNITED STATES.

1. Where one takes peaceable possession of a portion of the public

domain to which no other person has a claim, and possesses it in good faith, he will be protected to the extent of his enclosures. *Griffin v. cotten*, 1 R. R. 142.

2. A contract to sell a right to locate a certain number of acres on any unappropriated lands of the United States in a particular State, is not complied with by the offer of a right to locate such number of acres on any public lands in that State subject to entry. The contract contemplated the right of locating upon any part of the public domain within the State, while the offer restricted it to such portion as had been once offered at public sale. *Rightor and others v. Phelps*, 1 R. R. 325.

3. The proviso in the fourteenth section of the act of Congress of the 26th of March 1804, erecting Louisiana into two territories, and providing for the temporary government thereof contemplates two classes of titles: *first*, those granted according to the ordinances and usages of the Spanish Monarchy to heads of families, on the usual condition of settlement on the lands granted, provided such condition had been complied with before the cession to the United States; *secondly*, such as were applied for after the settlement had been made, commonly called permissions to settle with a *requêta*. In both cases, we are to look to the usages of the Spanish Monarchy for the definition of an *actual settler*, rather than to subsequent acts of Congress providing for pre-emptions in favor of persons who may have settled upon, *inhabited* and cultivated a part of the public domain. This *proviso* recognizes the authority of Spain to make certain grants after the date of the treaty of San Ildefonso. Congress has never treated the question as exclusively a political one, nor decided that the sovereignty of Louisiana was changed at the period. *Kenton v. Baroness of Pontalba, re-hearing*, 1 R. R. 355.

4. The act of Congress of the 3d of March, 1811, providing for the final adjustment of land claims, and for the sale of the public lands in the territories of Orleans and Louisiana, revived by the act of the 11th of May, 1820, and the act of the 15th of June, 1832, authorising the inhabitants of the State of Louisiana to enter back lands, continued in force by that of the 24th of February, 1835, authorizes the purchase of any *vacant* land, in the rear, *not exceeding* the quantity in the front tracts, leaving it to the discretion of the party to purchase any quantity he may desire within the prescribed limits. But when such party has made his election, and purchased the quantity he desired, though less than he was entitled to claim, he cannot afterwards assert his original rights, to the prejudice of innocent third persons, acting in good faith, and claiming under other laws. Nor will it suffice to allege that he acted through error, and purchased less than he was entitled to buy, in consequence of mistaking the number of acres in his front tract. It was his duty to have ascertained the number of acres it contained, and not having done so within the time prescribed by the acts under which he

purchased, his right of pre-emption was lost. *Landry v. Gautreau*, 1 R. R. 372.

5. The act of Congress of the 15th of June, 1832, is not a renewal of any previous act. It is an independent provision, in favor of those who had not had the benefit of former laws, and includes an entirely new class of cases not before provided for. *Id.*

6. Where an applicant for the purchase of certain public lands, under an act of Congress authorising the sale of such lands *when vacant*, does not disclose to the register of public lands or to the receiver of public moneys the fact, that they were occupied at the time of his application, the validity of the sale may be inquired into, without any previous proceeding on the part of the United States to annul it. The Court is bound to presume that the officers of the Government would not have sold the lands, had they known that they were occupied, and to declare the sale a nullity. *Id.*

7. The register of the land office, and the receiver of public moneys, acting as a Board of Commissioners for the adjustment of conflicting land claims, under the act of Congress of the 8th of May, 1822, have no power to revoke a certificate of confirmation once granted, nor to revise their own decisions touching the location of such conflicting claims, after rights have been acquired under them. *Boatner v. Scott*, 1 R. R. 546.

8. The act of Congress gives no appeal to the Commissioner of the general land-office from the decisions of the Board, but he may withhold a patent, when satisfied that a certificate of confirmation has been unfairly obtained, and, perhaps, order a new survey, where the survey presented as the basis of a patent, is shown to vary from the boundaries mentioned in the original title. *Id.*

9. A survey of a portion of the public lands, under an order from the land-office, approved by the surveyor general, is conclusive, unless it be shown that it deviates from the order. *Id.*

10. A copy of a survey, certified by the register of a land-office of the United States to be a correct transcript of the original survey in his office, is admissible in evidence. The copy is properly certified by the officer having the custody of the original. *Id.*

11. A copy of the certificate of the commissioners for adjusting land claims in favor of a claimant, certified by the surveyor general, is inadmissible. It should be certified by the register of the land-office. *Id.*

12. Under the seventh section of the act of Congress of 11th May, 1820, reviving section 5 of the act of 3d March, 1811, authorising the owner of any tract of land bordering on a water course in the territory of Orleans, to purchase, by preference, any vacant land in the rear of and adjacent to his tract, not exceeding a certain quantity, plaintiff, whose front tract had not then been surveyed, purchased, a few days before the expiration of the act, the quantity of land which he supposed himself entitled to claim. The seventh section, of the act of 1820, having been revived and

continued in force for eighteen months by section 1 of the act of 28th February, 1823, and plaintiff having within that time discovered that he had not entered as much land as he was entitled to, he applied for and purchased the additional quantity, a survey of which, by a surveyor of the United States, approved by the principal deputy surveyor in the district, was deposited in the surveyor general's office. When the public lands were surveyed, long after plaintiff's purchases the surveyors marked the first purchase on the township plats, but omitted the second, so that the land embraced by it appeared to be public; in consequence of the omission, defendant, a settler on the public lands, purchased a portion of the land included in plaintiff's second purchase under the act of 19th June, 1834, granting pre-emption rights. *held*, that having omitted, through error, to purchase, at first, the whole quantity of land to which he was entitled, and having availed himself of the discovery of his error in a short time afterwards, and before any one had taken advantage of it, or acquired any right to the land, plaintiff was entitled to purchase the additional quantity; and that the operations of the surveyors should not be allowed to take from, nor add to the rights and claims of individuals, when recognized by the proper officers of the United States. *Kittridge v. Breaud*, 2 R. R. 40.

13. Articles 2242 and 2417 of the Civil Code, which provide that a sale of immoveable property shall have effect against third persons, only from the day when it was registered in the office of a notary and the actual delivery of the thing took place, do not apply to titles derived from the United States, which has offices of its own for the disposition of its domain, and for the preservation of the records of whatever is done in relation thereto. *Id.*

14. The seventh section of the act of Congress of 11th May, 1820, reviving section 5 of the act of 3d March, 1811, authorising the owner of any tract of land bordering on a water course in the territory of Orleans, to purchase, by preference, any vacant land not exceeding a certain quantity, in the rear of and adjacent to his tract, continued in force by section 1 of the act of 28th February, 1823, requires that the land to which such privilege is given should be included within limits produced by the extension of the side lines of the front tract in the same direction; it contemplates no variation, but in the events of its being found necessary to divide the back lands among several claimants. *Kittridge v. Landry*, 2 R. R. 72. *Kittridge v. Dugas*, 2 R. R. 85.

15. Surveys made by surveyors in the service of the United States, though sanctioned by the principal deputy surveyor of the district, may be corrected when erroneous. *Id.*

16. The registers of the land-offices of the United States may, like all other keepers of public records, give copies or extracts from any books or documents in their custody, and such copies, when duly certified, are admissible in evidence; but they cannot

attest or certify the contents of such books or documents in any other manner. *Judice v. Chretien*, 3 R. R. 15.

17. The act of Congress of 29th May, 1830, granting pre-emption rights to settlers on the public lands, which provides, section 2, that where two or more persons are settled on the same quarter section, it may be divided between the two first actual settlers, if, by a North and South, or East and West line the settlement or improvement of each can be included in a half quarter section, and that in such case the settlers shall each be entitled to a pre-emption of eighty acres elsewhere in said land district, is directory only. Its object is to give to each settler, *first*, the portion of land on which his improvements were made, and *secondly*, as nearly as possible, an equal quantity of land. Equality of value was not considered important. The direction of the line of division was of secondary consideration, and only intended to effect the principal object. *Downes v. Scott*, 3 R. R. 84.

18. Where the United States have sold, and given a patent for a tract of land, the property is vested in the purchaser; and the laws of the State in which it is situated operate on it as another property, except as to taxation, or other special exception; and in effecting a partition, such laws, and the contract of the parties, will, as in other cases control. *Id.*

19. In ordering a partition between settlers on the same quarter section, holding as tenants in common, by purchase from the United States, under the pre-emption law of 29th of May, 1830, or between others holding under them, the provisions of that act will be considered as expressing the original intention of the parties as to the direction of the line of division, where the quarter section is a regular one; *aliter*, as to irregular or fractional surveys. Where lines drawn North and South, or East or West would not give to each an equal quantity of land, as well as his improvements, the line must be drawn in some other direction, or the land cannot be divided in kind. *Id.*

20. Under the act of Congress regulating pre-emptions, the register and receiver of the land-office in the district in which the land lies, have, alone, authority to decide upon claims for pre-emptions; and proof must be made, to their satisfaction, of all the facts necessary to establish the applicant's right to purchase by preference. *Kellam v. Rippey*, 3 R. R. 138.

21. The right to claim a pre-emption, conferred by act of Congress, does not give the party entitled thereto, any title in or to the land, until he exhibits the necessary proof, and procures the adjudication of the register and receiver of the land district. *Id.*

22. In an action by one claiming land under a patent from the United States, against a party in possession who had made valuable improvements thereon, the latter will be entitled to claim the excess of the value thereof above the fruits received since the commencement of suit. *Id.*

23. Where one entitled to claim a tract of land, as an actual settler prior to the twentieth of December, 1803, under the act of Congress of the third of March, 1807, relative to land claims in the territories of Orleans and Louisiana, sells all his right, title, and interest therein, and the claim is subsequently confirmed in the name of the original settler the confirmation will enure to the benefit of his vendee. *Noulen v. Perkins*, 3 R. R. 233.

24. One who sells all his right, title and interest in an improvement made on the public lands, must be considered as parting with all the ulterior advantages to which he may be entitled in virtue thereof. *Id.*

25. In controversies between the original grantee of a tract of land, or those claiming directly under him, and one in whose favor, as assignee, the title has been confirmed by the commissioners of the United States, the certificate in favor of the latter, and the facts recited in it, will not be evidence, but the confirmation will enure to the benefit of the party having the inchoate title. Otherwise, as to third persons showing no title. The commissioners appointed to decide upon land titles emanating from the former sovereigns of Louisiana, being authorised, by different acts of Congress, to confirm inchoate titles existing at the time of the change of Government, in favor of certain grantees, or *their legal representatives*, had authority, *incidentally*, to decide whether one who claimed, not as the original grantee, was entitled to a confirmation; and such confirmation, in favor of an assignee, has been uniformly regarded as entitling the latter to a patent. It is evidence against the Government, and though not binding on the original grantee, or those claiming under him, is *prima facie* evidence against the rest of the world. *Thomas v. Turnley*, 3 R. R. 206.

26. A receipt of the receiver of public moneys, for the price of government lands, is sufficient evidence of title from the United States, to form the basis of a petitory action; not that it is of equal dignity with a patent, but evidence of an equitable title on which the owner may recover. *Lott v. Prudhomme*, 3 R. R. 293.

27. Where the boundaries of a confirmed claim are vague and uncertain, and are to be fixed by the operations of the surveying department, or the confirmation is only the recognition of a pre-existing right, and before such survey and location the government sells a part of the land not necessarily embraced within the tract confirmed, the title of the purchaser under such sale will prevail. *Id.*

28. The commissioner of the general land office has no authority to vacate a patent already issued; but he may declare a *certificate of purchase* of lands which the law has forbidden to be sold or disposed of, to be void. *Id.*

29. Whenever the question arises, whether the title to property, which belonged to the United States, has passed, it must be resolved by the laws of the United States. But where it has once passed

it becomes, like all other property in the State, subject to State legislation, so far as such legislation is consistent with the admission that the title has so passed. *Lott v. Prudhomme*, 3 R. R. 293.

30. A patent from the United States, for a portion of the public lands, is conclusive, unless attacked on the ground of error or fraud; and the question of error or fraud, so far as it concerns a citizen of this State, must be determined by our laws. *Id.*

31. The moment a patent of public lands has passed the great seal, it is beyond the power of the officers of the United States, *Id.*

PUBLIC USE OF PROPERTY.

1. No particular form or ceremony is necessary in the dedication of land to public use. Lord Ellenborough decided that when the owner throws open a passage and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes nor prohibits persons from passing through it, he shall be presumed to have *dedicated it to the public*. *City Council of Lafayette v. Holland et al.*, 18 L. R. 286.

2. So, where the plan of a Faubourg exhibits a front street, called Levee street, running parallel with the levee, on which no specific number of feet are marked, and without any particular designation on the plan, it will be *presumed* to be dedicated to the public use, and required to be kept open and free for this purpose. *Id.*

PUBLIC PLACES.

1. Ancient plans of a city are admissible in evidence to prove the boundaries of lots sold in reference thereto, and the direction of streets so far as they may extend, although not including the *locus in quo*; and especially, when one of the parties claim under those who caused the plans to be made. *Carrollton Rail Road Co. v. Municipality No. 2*, 19 L. R. 62.

2. Where a canal and basin figure on the original plan of a city, but are always used and sold by the proprietors, they will be considered as private property. *Id.*

3. In order to dedicate property to public use there must be a plain and positive intention to give and one equally plain to accept. The form is not material. *Id.*

PUBLIC WORKS AND PLACES.

1. The police jury may recover from the owner the value of

repairs put on his plantation or property, in making levees and roads that are useful and necessary. A failure to give notice cannot defeat this action; it is founded on the great principle of equity, that no man shall profit by the labour of another, without compensation. (*Police Jury v. Hampton*, 5 Martin N. S. 389, 398. *Police Jury of Point Coupée v. Smith's syndics*, 14 L. R. 68.)

2. An open space had been used as an alley or public street, in the town of Natchitoches, for upwards of thirty years, but was not shown to have been designated as such, on the plan of the town, or by destination to public use: *held*, that it remained private property, and as such was held by the defendant's title. *Crossman et al v. Vignaud et al.*, 14 L. R. 173.

3. The right of passage, and to use an open space in a town, as a public alley or street, is not acquired by prescription. It is an interrupted servitude, which requires the act of man to be exercised, and can be exercised only by a title. *Id.*

QUASI CONTRACTS.

1. An heir to whose benefit the payment, by a third person, of a debt due by the ancestor, has enured, will be bound to refund the amount. *Wherry v. Bell*, 2 R. R. 225.

2. The joint owners of a plantation are liable, each for his virile share, for supplies furnished for its use. *Reynolds v. Rowley*, 3 R. R. 201.

3. Mere voluntary payments, on some previous occasions, will not, of themselves, create an obligation to pay under future, though similar circumstances. *Hazard v. Lambeth*, 3 R. R. 378.

4. Plaintiff having transferred certain shares of Bank stock to a third person for the purpose of enabling the transferee to raise money thereon, defendant caused a *fi. fa.*, which he had obtained against such third person, to be levied on the stock as the property of the latter. The execution was enjoined by plaintiff, who claimed the stock as his own. On a motion to dissolve: *held*, that by transferring the stock to enable the transferee to raise money thereon, plaintiff made him the apparent owner, and thereby deceived his creditors; and that the injunction was correctly dissolved. *Page v. Poree*, 3 R. R. 439.

QUASI OFFENCES.

1. Trespassers are liable jointly, each for his virile portion, but not *in solido*. *Barney v. De Russy, sheriff, and others*, 1 R. R. 75.

2. Where a land lord, instead of resorting to the means provided

by law for obtaining payment of his rent and possession of his premises, takes upon himself, without authority, to remove the property, and to turn out the family of his tenant, he will be liable in damages; and it will be no excuse, that such removal was effected without violence or injury. *Thayer v. Littlejohn and others*, 1 R. R. 140.

3. In an action for damages to plaintiff's carriage by an omnibus, belonging to the defendants, it is not necessary that the plaintiff should prove a legal title in the defendants to the omnibus; *prima facie* evidence of title, such as public reputation, will be sufficient, and for this purpose, a witness may be asked, whether the defendants were not generally reputed to be its owners. It will be for the latter to show that they were not. *Hart v. The New-Orleans and Carrollton Rail Road Company*, 1 R. R. 178.

4. A party will be responsible for damage occasioned by negligence or want of skill in a driver, or by the vicious temper of his horses, where the latter belonged to him, or the former was in his employment. *Id.*

5. The responsibility of a master or employer for the acts of his agents or servants, is not limited to cases where he is present and did not attempt to prevent the act complained of. *Id.*

6. In actions against officers for neglects, the redress in damages should always be proportioned to the injury really sustained. It would be unjust in such cases to place the plaintiff, at the expense of the defendant, in a better condition than he would have been, had no such neglect occurred. *Bonnabel v. Bouligny, sheriff*, 1 R. R. 292.

7. One who has received an injury, for which he is entitled to damages in a civil action, and which may give rise to a criminal prosecution, may lawfully receive a sum as the amount of the damages to which he is entitled, even when offered in the hope, that, being satisfied therewith, he will not resort to a criminal prosecution; and a promise to pay such damages is a good consideration for a note. *Butterly v. Blanchard*, 1 R. R. 340.

8. Where a collision between steamers or other vessels was the result of accident, the loss must be borne by the party on whom it has fallen. Where both were in fault, the damage must be divided. Where one only was to blame, all the loss must be borne by him. *Brickell v. Frisby*, 2 R. R. 204.

9. The plaintiff in a petitory action who has reasonable ground to believe that he has good cause of action, will not be liable in damages on discontinuing or losing his case. *Walden v. Peters*, 2 R. R. 331.

10. Defendant having seized under a *fi. fa.* certain moveables belonging to the husband of the plaintiff, the latter procured an injunction, pending which she obtained a judgment against her husband in a suit of separation of property, and, in virtue thereof, caused the moveable property, previously seized by defendant, to be sold,

and purchased it herself, crediting the amount upon her judgment. On a motion to dissolve the injunction: *held*, that by his seizure defendant had acquired a privilege on the moveables seized; that the rights of the wife, being merely paraphernal, gave her no privilege on the moveables; and that having, by the effect of her seizure, disabled the defendant from enforcing his privilege, she was responsible in damages for the injury he sustained from her act. *Strafford v. Dunwoodie*, 3 R. R. 276.

RAIL-ROADS.

1. The Pontchartrain Rail-Road Company have the exclusive right and privilege, for twenty-five years from 1830, of constructing and using a rail-road from the City of New-Orleans to lake Pontchartrain. *Pontchartrain Rail-Road Company v. Orleans Navigation Company*, 15 L. R. 404.

2. The Legislature possesses the power of granting exclusive rights and privileges as the reward of constructing rails-roads, in the same manner as Congress may reward the discoverer of a new invention. *Id.*

RATIFICATION.

1. Where the ratification of a sale of certain proceedings is relied on, the burden of proof is on the party alleging it, and facts must be established from which the *ratification necessarily results*, where there is no positive proof. *Rivas' heirs v. Bernard*, 13 L. R. 159.

2. To give validity to a contract which is merely voidable, it must be deliberately, and upon examination, ratified and *confirmed* by the party to be binding on him. *Id.*

3. The acts of a party from which the ratification of a contract is sought to be deduced, must evince clearly and unequivocally his *intention to ratify*. If his acts be in any manner accounted for without a ratification of the contract necessarily resulting from them, they do not amount to an approval or confirmation. *Copeland v. Mickie et al.*, 17 L. R. 286.

4. No tacit approval or ratification of an act or contract is recognized except that which results from the fact of suffering time to elapse within which the rescissory action may be exercised. *Id.*

5. So in a contract of sale procured by threats and violence and where the party received the money, partly through necessity and from the belief that it was incumbent on him to use diligence to collect the draft in which he was to be paid, but he soon after

tendered the money and demanded a rescission of the sale: *held*, that in thus receiving the money, there was no *intention* manifested to ratify the sale. *Copeland v. Mickie et al.*, 17 L. R. 286.

6. Where the purchaser of a slave at probate sale, remains in the undisturbed possession and has paid part of the price, it will be considered a ratification of the sale and he cannot resist payment of the balance. *Stephenson's administrator v. Addison et al.*, 17 L. R. 454.

RECEIVER.

1. Though a receiver, appointed to collect money due to the parties to a suit, have no authority to pay debts due by them, yet if they know that he is doing so, and do not object at the time, they cannot do so afterwards. *Kellar v. Williams*, 3 R. R. 321.

2. Where on the motion of one of the parties to a suit, with the consent of the other, a third person is appointed by the Court to receive and sue for all amounts due to the litigants, on giving bond, with security, to hold the amounts so received subject to the order of the Court, he will not be considered an officer of the Court, but the agent of the parties, and only responsible as such. The appointment is the act of the parties. *Id.*

RECONVENTION.

1. In an action of slander for damages, in consequence of slanderous words spoken, the defendant cannot reconvene for slanderous words alleged to have been uttered by the plaintiff against him. *Kemp v. Amacker*, 13 L. R. 65.

2. The demand in reconvention, in an action for slanderous words spoken, is not necessarily connected with and incidental to the principal one, as is required by law. *Id.*

3. A plea in reconvention, claiming damages for alleged injury done to the credit, &c., of the defendant, by suing him on his own notes, will be *disallowed*, as there is no connection between the two demands. *Union Bank v. McDonald*, 15 L. R. 25.

4. A plea in compensation and reconvention setting up different matter, in no way connected with the plaintiff's demand, will be rejected. *Merchants' Bank v. Gove*. 15 L. R. 378.

5. Where the reconventional demand set up, grows out of the same transactions with the principal one sued on, even if it be not liquidated, it should be sustained and the two demands tried together. *Bayne v. Fox*, 18 L. R. 80.

6. It matters not whether the demand against which the recon-

vention is opposed be liquidated or not, provided the reconventional one is connected with the original demand. *Bayne v. Fox*, 18 L. R. 80.

7. A party setting up an unliquidated demand in compensation and reconvention of a suit on a promissory note, must bring himself strictly within the rules, and be ready with his evidence at the time fixed for trial. *Biernacki v. Mexia*, 18 L. R. 86.

RECORD.

1. Notes annexed to a petition cannot be withdrawn, without leaving copies, which will form part of record. *Gray v. Commercial bank of New-Orleans*, 1 R. R. 533.

REDHIBITION.

1. In a redhibitory action for the rescission of the sale of a slave, when the evidence leaves it doubtful whether the disease, of which the slave was afflicted, originated before or after the sale, and the jury find for the defendant, their verdict will not be disturbed. *Barnett v. Macoin*, 14 L. R. 428.

2. A slave may appear perfectly healthy at the time of sale, and yet be afflicted with a redhibitory disease, rendering her valueless, and which does not come within the law providing for defects discoverable on simple inspection. *Herries v. Botts*, 14 L. R. 432.

3. A disease, although not known at the time, which renders a slave so valueless that it must be supposed the owner would not have purchased her had he known it, is a redhibitory one, which authorizes a rescission of the sale and return of the price. *Id.*

4. Where a slave died from a disease which was not incurable by its nature, nor had become so by the progress it had made at the time of the sale, and it is shown there was not that care and attention paid to the slave which the nature of his case required, no recovery of the price can be had in a redhibitory action or exception. *Serapurn, syndic, &c. v. Bousquet et al.*, 15 L. R. 509.

5. Where purchasers of a slave who died soon after the sale, are shown not to have acted as prudent men, and the loss of the slave may be attributed to their fault and neglect, they cannot avail themselves of redhibition to recover the price. *Id.*

6. Where a slave is expressly excepted, in the act of the sale from the warranty, of being *sound in body*, it will be considered a solemn declaration that he is unsound, and the purchaser takes him absolutely at his risk. *Nelson v. Lillard*, 16 L. R. 336.

7. Where the evidence does not show that the slave was affected

with a redhibitory disease, at the time of sale, it is insufficient to rescind the sale, although it is proved he was sick shortly after the sale. *Nelson v. Lillard*, 16 L. R. 336.

8. The exclusion of warranty in a sale, does not absolve a vendor from the obligation of disclosing the redhibitory vices not apparent. *Turner & Renshaw v. Wheaton et al.*, 18 L. R. 37.

9. Where the seller failed to inform the buyer that the slave was a runaway, it was held sufficient to rescind the sale, although sold without warranty except as to title. *Id.*

10. In a redhibitory action for the rescission of the sale and refunding the price, an offer to return the slaves is sufficient if it be rejected; as there is then no necessity of making an actual tender. *Bownman v. Ware*, 18 L. R. 597.

11. In a redhibitory action for the rescission of the sale of a slave, a tender or offer to return the slave must be proved at the trial, to have been made before suit. *Barrett v. Bullard*, 19 L. R. 281.

12. Actual idiocy might, perhaps, be deemed a redhibitory vice in a slave; although not specially named in the Code; but such defect would be so apparent to an ordinary observer as to bring the case within the article 2497 of the Louisiana Code. *Briant v. Marsh*, 19 L. R. 391.

13. Where the evidence establishes the existence of a redhibitory disease at the time of sale, although not perceptible to ordinary observers, or known to the vendors; yet it is sufficient to authorize a rescission of the sale and return of the price. *Riggs v. Duperrier et al.*, 19 L. R. 418.

REGISTER OF CONVEYANCES IN NEW-ORLEANS.

1. The act of 20th March, 1827, establishing the office of Register of Conveyances for the City and Parish of New-Orleans, was intended only to create a particular office, for that City and Parish, in which all transfers of immoveable property should be recorded, which, in other Parishes, were required to be recorded in the office of the Parish Judge. *Lee v. Darramon*, 3 R. R. 160.

REGISTRY.

1. It will be no objection to the admissibility in evidence of an act, executed by plaintiff's vendor, in relation to the land in dispute, that no evidence was adduced of its having been recorded in the office of the Parish Judge, without which it could have no effect against third persons. Whether the act is binding on the plaintiff, is a question going to the effect, and not to the admissibility of the

instrument. *Kittridge v. Landry*, 2 R. R. 72. *Kittridge v. Dugas*, 2 R. R. 85.

2. A notarial act, by which it was agreed that certain lines should form the boundary between the lands claimed by the parties thereto, not recorded in the office of the Parish Judge, is void as to third persons, or innocent purchasers without notice. *Kittridge v. Landry*, 2 R. R. 72.

3. A sale by a sheriff of an immoveable, seized under a *fi. fa.*, is void as to third persons not proved to have had actual notice, when it has not been recorded in the office of the Register of Conveyances as required by law. *Murphy v. Jandot*, 2 R. R. 378.

4. The provisions of articles 697 and 698 of the Code of Practice, requiring the sheriff to cause the act of sale executed by him for property sold under a *fi. fa.* to be recorded in the office of the clerk of the Court from which the writ was issued, were designed to give to the sheriff's deed the authenticity of a notarial act, and to authorize its introduction in evidence without further proof of its execution. They do not repeal, nor in any way modify the act of the 24th March, 1810, which declares, section 7, that no notarial act concerning immoveable property shall have effect against third persons, until recorded in the office of the Parish Judge of the Parish in which it is situated; nor that of 26th March 1813, providing, section 1, that sales of land or slaves, under execution, shall, except between the parties, be void, unless so recorded. *Lee v. Darramon*, 3 R. R. 160.

5. Where the sheriff's deed for immoveable property sold under a *fi. fa.*, subject to a previous mortgage, has not been recorded in the office of the Parish Judge of the Parish in which the property is situated, it will be without effect as to the hypothecary creditor, who may seize and sell the same as if in possession of the original debtor. *Id.*

REMOVAL OF CAUSES.

1. Where a corporation existing in another State is sued by attachment here, it is sufficient for such defendants to present a petition in compliance with the twelfth section of the judiciary act of 1789, and allege that the corporators are all and each of them, citizens of another or other States, or aliens, in order to have the cause removed to the United States Court. *Oakey et al. v. Commercial and Rail-Road Bank of Vicksburg*, 14 L. R. 515.

2. In an application for the removal of a cause to the United States Court, the State Court has no authority to inquire into the truth of the allegations in the petition. It is sufficient, and the record must show, that the defendants are citizens of another State or aliens. *Id.*

RES JUDICATA.

1. A judgment rescinding an order of seizure and sale on account of the insufficiency of the authentic evidence, on which it was granted, but without prejudice to the creditor's rights in any other remedy he might seek, cannot be pleaded as *res judicata* or in bar of an action in the *via ordinaria*. *Police jury of Point Coupée v. Smith's Syndics*, 14 L. R. 68.

2. Where the defendant in eviction calls his vendor in warranty, demanding the return of the *price*, and the value of the improvements, with a prayer for general relief; and has judgment accordingly on this issue, it forms *res judicata* in a subsequent action for the increased value and price of the land and improvements. *Vascocu's widow and heirs v. Pavie*, 14 L. R. 135.

3. Where a judgment of a Court of competent jurisdiction stands unappealed from, and is final, it is conclusive on all matters embraced in it; whatever may be the errors or injustice done by it, it forms *res judicata* and cannot be re-examined. *Patterson v. Bonner et al.*, 14 L. R. 214.

4. Proceedings had *ex parte*, going to homologate a tutor's account and grant a final discharge, when there is no opportunity given to the heir at law to contest the account, are illegal, and do not form *res judicata*, when the tutor is called on to render his account by the heir of the deceased pupil. *Gillispie v. Day*, 14 L. R. 289.

5. The judgment of homologation of a tableau of distribution so far as it settles the rank and privilege of creditors is final, and is *res judicata*, so far as relates to their *rank* in all subsequent tableaux. *Long et al. v. their creditors*, 14 L. R. 241.

6. In an action to recover the rents and profits in a separate suit after eviction, and the defendant pleads, in compensation and reconvention of the plaintiff's demand, the enhanced value of the land, he cannot afterwards avail himself of the plea of *res judicata*. *Pearce et al. v. Frantum*, 16 L. R. 414.

7. A plea which states that a final settlement had taken place of all accounts and *transactions* between the parties at a certain period, is an admission which precludes the party making this plea, from claiming any balance apparently due before that period. *Erwin's heirs and assigns v. Bissell et al.*, 17 L. R. 92.

8. The judgment forms the authority of the thing adjudged upon all matters and demands set up in the pleadings. *Id.*

9. A judgment not rendered between the same parties, cannot form the plea of *res judicata*. *Randall v. Bank of Louisiana*, 17 L. R. 273.

10. The plea of *res judicata* in a petitory action cannot be sustained by the proceedings in a possessory one. A judgment in a possessory action is no bar to an action in revendication although

it be between the same parties and for the same object. *City Council of Lafayette v. Holland et al.*, 18 L. R. 286.

11. In judgments of the Supreme Court, the reasoning is less to be regarded than the final conclusion announced; so when the decree is positive, without any reservation, it is *res judicata* as to all the matters in dispute. *Plicque & LeBeau v. Perrett etc.*, 19 L. R. 318.

12. No matter in what form of action or proceeding, whether by petition, exception or intervention the question may have been presented, if the same question once judicially decided between the parties be again agitated, it is sufficient to create the presumption resulting from the *thing adjudged*, and forms a complete bar. *Id.*

13. Questions which have been decided in another action between the same parties, or between the plaintiff and the vendor of defendants, to whose rights the latter were subrogated, cannot be re-examined. *Daughters, administrator v. Guice and others*, 1 R. R. 37.

14. The proceedings in a Court of Probates for the settlement of an estate, such as the probate of a will, and the order of its execution, cannot be considered as a judgment binding on third persons not parties thereto. *Rachal, tutor and another v. Rachal and husband*, 1 R. R. 115.

15. A claim which a party has failed to establish in a direct action, cannot be set up by way of exception in another. *Armistead and another v. Spring*, 1 R. R. 567. *Jarvis and others v. Armistead and others*, 1 R. R. 567.

16. A question decided by a competent tribunal of another State after due proceedings, will not be examined in the Courts of this State. *Jordan v. Black*, 1 R. R. 575.

17. The fact that a party was a minor at the time that a judgment was rendered against him, and that his tutor did not attend to, or understand his rights, or take the necessary pains to procure the testimony to establish them, will not entitle him to relief, though it be proved that a different judgment must have been rendered, had the proper testimony been produced in the first instance. The first judgment is *res judicata*. *Towles v. Conrad*, 3 R. R. 69.

18. The discovery, since the final decision of the Appellate Court, of new evidence tending to establish allegations in the original petition, is no ground for enjoining the execution of the judgment. The matter is *res judicata*. *Campbell v. Briggs*, 3 R. R. 110.

19. The record of another suit, when offered to support a plea of *res judicata*, is admissible to show what the parties claimed, and what was decided in such suit. So, the record of another suit, to which the plaintiffs were parties, though joined with others and in a different capacity, is admissible against them, when offered by the defendants, who were plaintiffs in that case; the latter are entitled to the full benefit of any decision made on the rights of the parties,

and to show that the plaintiffs have compromised any of their rights by that suit. *Wells v. Compton*, 3 R. R. 171.

20. An injunction will not lie to stay the execution of a judgment for the amount of a note given for the price of a tract of land, on the allegation that, since the rendering of the judgment, plaintiff has discovered that the defendant, his vendor, had no title to the land. The execution can only be resisted by appeal, or action of nullity, or on an allegation of extinguishment by payment, release, confusion, novation or other legal mode. *Morrison v. Crooks*, 3 R. R. 273.

RESPITE.

1. A debtor who, being unable to pay all his debts at the moment, transacts with his creditors and obtains from them a delay, is not an insolvent. The concession of a respite is based upon the supposed solvency, or eventual ability of the applicant to pay all his debts. The laws relative to respite are not insolvent laws. *Rash v. his creditors*, 3 R. R. 407. *Miller v. Rash*, 3 R. R. 410.

2. The debtor who applies for a respite does not seek a discharge from his obligations, nor attempt to impair them. The laws of this State relative to respites are not unconstitutional, nor were they repealed or suspended by the act of Congress of 19th August, 1841, establishing an uniform system of bankruptcy. *Rash v. his creditors*, 3 R. R. 407.

RIGHT OF PASSAGE.

1. It is only for plantations enclosed and surrounded by other lands, that the right of passage or of way over the lands of others, is established by law. *Martin et al. v. Patin et al.*, 16 L. R. 55.

2. The right of passage over the land of others, is not given as a matter of convenience but of necessity; so, where there is room to go round the lands of a neighbor, the right of passage will not be allowed to go through and compel the latter to leave a lane. *Id.*

ROADS AND LEVEES.

1. Strict compliance with the law, and the police regulations, must be shown, to legalize a sale of land by commissioners of Roads and Levees, made to pay for work done thereon. *Winchester v. Cain and another*, 1 R. R. 421.

RULE OF COURT.

1. Where it is provided by a rule of Court, that in all cases where notice is required, and no time is specified in the Code, three days shall be sufficient, a rule taken on the 29th of June to show cause on the 1st of July, will not be sufficient notice. *Erwin v. McKing and another. Same v. Kenny and another* 1 R. R. 217.

RULE TO SHOW CAUSE.

1. On a rule to show cause why an order of arrest should not be dissolved, in a case in which property had been previously attached, proof of the insufficiency of the property attached will not be on the plaintiff, where its sufficiency was not made a ground of the rule to quash the arrest. *New-Orleans Canal and Banking Co. v. Comly*, 1. R. R. 231. *Erwin v. Kenny and anothers*, 1 R. R. 217.

2. Execution having been issued against defendant in an action on a note secured by mortgage, the proceedings were enjoined by a third person, the real owner of the mortgaged property, and the real debtor of the amount of the note; and a judgment was entered by consent, recognizing the property as belonging to the intervenor, and ordering its sale. The sale made in pursuance of this judgment having been set aside for irregularity, plaintiff took a rule on intervenor to show cause why a *pluries fi. fa.* should not be issued. On an answer by the latter alleging the illegality of the judgment, and denying plaintiffs' right to proceed in the manner adopted by them, and praying for a trial by jury: *held*, that the rule presented no issue or question of fact for a trial by jury, and that such trial was correctly refused. *Hobson v. Bein*, 2 R. R. 109.

3. A rule to show cause why the terms of a judicial sale should not be complied with, or the property again sold at the risk of the first purchaser, made absolute, the effect of which would be to annul a sale made by a competent officer, can have no effect unless signed by the judge. *Gallier v. Garcia*, 2 R. R. 319.

4. The answer to a rule to show cause taken against the judge of an inferior Court, must be in writing and filed with the clerk of the Supreme Court. No answer in person, or oral discussion will be listened to, except from the parties interested, or their counsel. *State v. Judge of Court of Probates of New-Orleans*, 2 R. R. 418.

5. Where through error, an order has been made allowing a suspensive appeal on security for costs only, and no transcript of the record has been delivered to the party, the order may be rescinded by the lower Court on a rule to show cause. *Mathison v. Field*, 3 R. R. 42.

6. Action for \$90 paid to defendant in error, as owner of a butcher's stall, and for \$2,000 damages for forcibly turning plaintiff out and retaining the possession of the stall. Plaintiff having obtained a rule on defendant to show cause why he should not be put in possession, it was made absolute, and defendant appealed. *Held*, that the Court erred in ordering a part of the case to be tried on a rule, and leaving the remainder untried. A cause should not be tried on any other day than the one fixed by the Court, when called in its turn. C. P. 463. *Garber v. Marzoni*, 3 R. R. 370. *Beaudoin v. Rochebrun*, 3 R. R. 372.

SALARY.

1. Where an engineer was employed by a cotton-press by the year, at a fixed salary, and was discharged by the company before the end of the year, without any other cause than that his services were *no longer required*, it was held that he is entitled to recover his salary for the whole term. *Sherburne v. Orleans Cotton-Press*, 15 L. R. 360.

2. The plaintiff as President of the Orleans Cotton-Press Company, when there was no salary fixed, claimed \$3,000 per annum for his services; and the testimony of witnesses went to show they were worth it: *held*, that the sum of \$2,000, voted to his successor, be taken as the proper amount to be allowed. *Byrne v. Orleans Cotton-Press Company*, 18 L. R. 336.

SALE.

1. Where a tract of land is sold for cash at the probate sale of a succession, and expressly declared to be subject to a lien in favor of the vendor for the original price and interest, and the purchaser bids over this amount, he is entitled to the benefit of this bid, by paying the overplus in cash. *Bradford v. Dortch et al.*, 13 L. R. 79.

2. So, if the sum due the vendor has been seized in execution, the purchaser of the land at probate sale takes it subject to this claim, in whosoever hands it may come, when it is so declared. *Id.*

3. The sale of an estate inherited by minor heirs may be made below the appraisement price, in order to pay the debts of the ancestor. *Hutchiss, tutor, etc. v. Dodd et al.*, 13 L. R. 84.

4. When such sale is provoked by a creditor, and it is not shown to be necessary for the payment of the debts, but principally to effect a partition, it is null and void. *Id.*

5. An act for the retrocession of certain property, signed only by the purchaser, is not binding, and has no force on the seller,

until accepted by him in some legal manner. *Municipality No. 1 v. Barnett*, 13 L. R. 344.

6. If the date of a purchaser's signature to an act of retrocession be proved, it is a mere pollicitation, until signed or accepted by the other party, and ceases to have any effect the moment his capacity to accept is taken away. *Id.*

7. A simulated sale, as between the parties is absolutely null. *Hiriart v. Roger et al.*, 13 L. R. 126.

8. Where the evidence establishes fraud on the part of the purchaser, the sale will be declared fraudulent and void as regards creditors, at the suit of a creditor of the original vendor. *Id.*

9. A person who has a mere equitable interest in property, is not allowed to question the validity of a sale of it, when he permitted the legal title to remain in another, and when it passed into the hands of a *bonâ fide* purchaser without notice. *Dozer v. Squires & Donaud et al.*, 13 L. R. 130.

10. In sales *per aversionem*, the purchaser cannot claim diminution of price for a deficiency in measurement; but if he has been led into error by the fraudulent concealment of the vendor as to the real quantity, he is not without remedy, and will be allowed to produce evidence of fraud and concealment under the proper allegations. *Lesassier v. Dashiell*, 13 L. R. 151.

11. Good faith is required in sales *per aversionem*, as much as in any other kind of contracts; and when fraud and concealment is alleged in the pleadings the Court should allow the inquiry to be gone into. *Id.*

12. So, the purchaser was permitted to introduce evidence to show that the vendor knew at the time of the sale, which was *per aversionem*, that the tract of land described in the act of sale contained less than the quantity mentioned. *Id.*

13. The adjudication of property held in common between the surviving parent and minor children is *alone authorized*. The separate property of the deceased parent descends to his children, and can only be alienated in the manner prescribed by law for the sales of minors' property. *Rivas' heirs v. Bernard*, 13 L. R. 159.

14. Where the ratification of a sale is relied on, the burden of proof is on the party alleging it, and facts must be established from which the *ratification necessarily results* when there is no positive proof. *Id.*

15. An agreement to sell a lot of ground, in which it is designated and the price and terms of payment specified, is a *sale*, according to article 2431 of the Louisiana Code, and the seller is bound to execute a title accordingly. *Long v. French*, 13 L. R. 257.

16. Property claimed in a suit, in virtue of a *sale*, cannot be alienated by the adverse party, pending the action, so as to prejudice the plaintiff's right. *Id.*

17. Combinations at auction sales to enhance the price by false bids, or depress it by false assertions, are artifices which *invalidate*

the sale when practised by those who are parties to it. *Baham v. Bach*, 13 L. R. 287.

18. As soon as the auctioneer declares the highest bidder to be the purchaser, and the thing sold is adjudicated to him, the contract of sale is subject to the same rules which govern ordinary sales. *Id.*

19. When the act of sale contains the clause de *non alienando*, the vendor is relieved from the necessity of making the third possessor a party to the executory proceedings, in asserting his mortgage against the mortgaged premises. *Nicolet's executor v. Moreau et al.*, 13 L. R. 313.

20. The buyer, at probate sale, to whom a slave is adjudicated, cannot avoid the sale and payment of the price on the ground of the redhibitory vice of running away, without administering proof that this vice existed at or before the sale. *Fortier et al. v. Labranche*, 13 L. R. 355.

21. An agreement by the heirs to rescind a probate sale of a slave is invalid, if not made in writing; and where some of the heirs are minors it cannot be legally made in any form. *Id.*

22. In the probate sale of a slave, to pay the debts of a succession, where the executor expressly declares he does not warrant against any of the redhibitory vices or maladies prescribed by law, the purchaser cannot avail himself of the redhibitory vice of an habitual runaway, to avoid the sale and payment of the price, even if this fact was known to the owner in his life time, and not declared. *Magoffin v. Stringer et al.*, 13 L. R. 370.

23. The price of a sale must be serious, and a price which is out of all proportion with the value of the thing sold, invalidates the sale. *D'orgenoy et al. v. Drex*, 13 L. R. 382.

24. A sale without a price is not binding as such on the parties; but the act may have effect as a donation, if it contains nothing contrary to public order, provided the purchaser can receive a donation from the vendor, and no injury results to third persons. *Id.*

25. It has been adopted as a general rule of law, that a sale without a price is a donation. *Id.*

26. A sale without a price, or for a fictitious price, although null as a sale for want of the essential requisites of that contract, is nevertheless valid as a donation, provided tradition follows. *Id.*

27. It is not necessary that the appointment of appraisers should form a part of the decree, ordering the sale of property inherited by minors to pay the debts of the succession, or that their names be mentioned in the order. Their appointment may be entered afterwards on the minutes of the Court. When the substantial requisites of the law are complied with, it will suffice. *Lalanne's heirs v. Moreau*, 13 L. R. 431.

28. The decree of the Court of Probates upon the recommendation of a family meeting for the sale of property inherited by minors, to pay the debts of the succession, is so purely *in rem*, and

against the property, independently of the persons, that the sale made under it extinguishes all the mortgages existing in the name of the owner of the property. *Lalanne's heirs v. Moreau*, 13 L. R. 431.

29. Sales directed by the Court of Probates are judicial sales to all intents and purposes, and the purchaser is protected by the decree ordering them. *Id.*

30. It is settled in most of the States of the Union, that the purchaser under a decree of the orphan's court is bound to look to the jurisdiction; but that the truth of the record, concerning matters within that jurisdiction, cannot be disputed. If the facts necessary to give the Court jurisdiction appear on the face of the proceedings, the purchaser need not look beyond the decree. *Id.*

31. A fraudulent sale of personal property, although followed by possession gives no right of property to the purchaser; and the true owner has his action against the latter for its recovery. *Weld et al. v. Donlin*, 13 L. R. 460.

32. A proprietor who divides a piece of land into lots, and offers them for sale, is not required to submit a plan of his town for the approval of the police jury. *Ollie v. Ogilvie*, 13 L. R. 472.

33. So the owner is not guilty of deception towards the purchasers of lots when he omits to mark on his plan a *private* road which had been used to pass over his land, and which is afterwards taken for a public road; it is sufficient to designate the public road and levee existing, as such, at the time. *Id.*

34. Where certain lots were sold in reference to a plan representing a *passage* through the square on which some of the lots were made to front, and it turned out that there was no public passage authorised by the corporation, this was held to be such an artifice or error as would avoid and annul the sale at the instance of the purchaser. *Chalon v. Pepin*, 13 L. R. 534.

35. A sheriff's sale, which recited that it was made in pursuance of a certain judgment, which, in fact, did not exist as set forth, was held to be defective, and conveyed no title to the purchaser. The sale by the sheriff is the last act under the judgment and execution, and fixes the condition of the purchaser under it. *Bailly, f. m. c. v. Percy, f. w. c.*, 14 L. R. 17.

36. Where a sheriff's sale purported to transfer all the *right*, title and *interest*, of a particular defendant in execution, to the purchaser, and it appeared this defendant was not a party condemned in the judgment, *by name*, and was not in fact the true owner of the property seized, the sale was held to be bad, and conveyed no title. *Id.*

37. A licitation made to effect a partition, is not a sale as between the heirs, and does not change the character of the thing to be divided. The proceeds of real estate represent it, and are realty. *Hooke v. Hooke et al.*, 14 L. R. 22.

38. Where a probate sale is attacked as fraudulent, null and void, and the matter is left to a jury, who, in their verdict, treat the sale as a nullity, which is supported by evidence, the purchaser cannot avail himself of title, or have any recourse, in warranty, against the heirs of the deceased owner. *Webb v. Gorman et al.*, 14 L. R. 38.

39. Where sales are shown to be simulated, the property will be declared to belong to the original owner. *Champagne v. Champagne's syndic*, 14 L. R. 51.

40. In a sale with a defeasible condition (*vente à réméré*) it rests solely on the will of the vendor to dissolve the contract, and his expression of that will must have the same effect as the will of both parties in creating the contract. *Patterson v. Bomar et al.*, 14 L. R. 214.

41. So, where the vendor in a sale, with a defeasible condition, in the presence of two witnesses, offered to repay the price, and redeem the property within the time limited, which was refused, and he made no consignment of the money: *held*, that this was a sufficient notification to the vendee of the intention to redeem, and preserve to the vendor the right of action to dissolve the contract after the term had elapsed. *Id.*

42. Although the right of redemption is preserved to the vendor, on his manifestation of his intention and readiness to redeem, within the term limited, yet without a consignment or tender of the money, he is not entitled to the fruits or profits. *Id.*

43. In a *vente à réméré*, where the vendee has possession and enjoys the fruits or profits of the property, a stipulation to pay ten per cent interest, on redemption and re-payment of the price, will be deemed illegal. *Id.*

44. A sale of property inherited by a minor, ordered by a family meeting not convoked for that purpose, and which is not shown to be necessary, is null and void, and will be set aside, on an opposition to a motion for its confirmation. *Morris et al. v. Kemp*, 14 L. R. 251.

45. A family meeting convoked for specific and different purposes, is without authority to order a sale of property inherited by a minor, whose interests they are called on to protect. *Id.*

46. A sale to effect a partition is null if the formalities required by law are not complied with. *Pipkin v. Thompson*, 14 L. R. 272.

47. A sale of slaves by authentic act cannot be attacked collaterally, or considered as fraudulent and be disregarded. It can only be set aside by a revocatory action. *Morton v. Crosby et al.*, 14 L. R. 424.

48. Where several lots are sold in block, designated by numbers in a particular square, according to a *plan*, although the number of feet contained in each is specified, it is a sale *per aversionem*. The reference to the plan and boundaries of the streets must control the

measurement of the lots. *Kirkpatrick v. McMillen et al.*, 14 L. R. 497.

49. In a sale *per aversionem* notwithstanding the deficiency in the superficial quantity, the purchaser cannot claim a diminution in price. *Id.*

50. The remedy given to the owner of property to prosecute the *folle enchère*, on purchaser failing to comply with his bid, is cumulative. He may elect to prosecute the purchaser for a specific compliance with the terms of sale, or for damages, or he may proceed to a re-sale, at the risk of the first purchaser. *Municipality No. 2 v. Hennen*, 14 L. R. 559.

51. The vendor in prosecuting the *folle enchère* cannot recover the difference between the first and last sale, if he bids in his own property. *Id.*

52. So the legal owner, or mandatory of the owner, who is alone interested in a sale at auction, is equally incompetent to purchase property at such sale; and so far as the *folle enchère* is concerned, the sale is null and void. *Id.*

53. Where a part of the calls and boundaries expressed in a deed are inconsistent with the stipulations in the contract of sale, and impossible to be complied with, they will be disregarded. *Marshall v. Fogleman*, 14 L. R. 151.

54. Under the Roman law, no resolutive condition was implied in the contract of sale. If the *pactum commissarium* was not expressly stipulated, the vendor had no right to take back his property if the price was not paid; with such a stipulation, if the price was not paid at the appointed time, the sale was void. *Canal Bank et al. v. Copeland*, 15 L. R. 75.

55. If after the expiration of the stipulated time, the vendor sued for the price, he was considered as acknowledging the sale, and precluded from treating it as a nullity, or recovering back the property. *Id.*

56. So, where the vendors sued the vendee for a specific compliance with the terms of adjudication and payment of the price, and failed to enforce payment: *held*, that an action for the rescission of the sale afterwards, was well brought. *Id.*

57. Under the law of Louisiana, the effect of the resolutive clause, implied in all synallagmatic contracts, is not to render the contract void *ipso facto*, but only *voidable* on the demand of the party complaining. There is, therefore, no inconsistency in suing for the rescission of the sale, after having claimed the price without success. *Id.*

58. The sale of a lot of ground in New-Orleans before the division of the city into municipalities, cannot be enforced or rescinded by the municipality in which the property is situated. This right can only be exercised by the mayor and commissioners of the sinking fund. *Municipality No. 1 v. Brothers*, 15 L. R. 128.

59. The registry act of Congress passed in 1792, section 11,

relating to ship and vessels, is only intended to regulate the national character of the vessel, and not to vest title in the new owner, by transfer and sale. *Begley v. Morgan et al.*, 15 L. R. 162.

60. The transmission of a bill of sale to the purchaser, followed by its actual receipt, is a delivery to him at the moment of the transmission, which takes effect from its date. *Id.*

61. In order to constitute a sale *per aversionem*, there must be certain limits or boundaries given, or a distinct and separate object described, as a field enclosed, or an island. *Fisk v. Fleming's syndic*, 15 L. R. 202.

62. Where a tract of land is sold, with no boundaries or limits, except as fronting on the river, and described as having eight arpents front, forming about nine hundred and eighty superficial arpents, with an incomplete double concession, and it is afterwards ascertained to contain less, the purchaser must have the difference in price, in proportion to the diminution in quantity, refunded. *Id.*

63. The purchaser at auction sales, looks for a description of the thing sold, principally to the *procès verbal* of the auctioneer, or act of sale rather than to title deeds delivered, furnishing evidence of title. *Id.*

64. The admission of an agent, accepting a sale, that the title deeds to the property were furnished, does not amount to an exemption from warranty on the part of the vendor, as to the quantity of land set forth in the act of sale. *Id.*

65. The vendor cannot be aware that the property he sells was purchased on speculation, and with a view to immediate resale; and the vendee will not be allowed to set up as error in the motive, the fact that a tacit mortgage existed on the property, which was fraudulently concealed from him, in avoidance or rescission of the sale. *Peirce v. McMahan et al.*, 15 L. R. 218.

66. Where the tutor observes all the forms required by the act of 1830, authorising a special mortgage to be substituted in lieu of the general one resulting from the tutorship, it frees the other property from all incumbrance; and a purchaser cannot set it up in avoidance of the sale. *Id.*

67. Where an act of sale contains the clause *de non alienando*, any sale or transfer made in violation of it, is *ipso jure* void as respects the first vendor. *Lawrence v. Burthe et al.*, 15 L. R. 267.

68. The first vendor who sells with the clause *de non alienando*, may have the property on which the mortgage rests, seized and sold, as if no change had taken place, and without notifying or making the vendee or his mortgagor a party. *Id.*

69. Where an act of sale of mortgaged property is not recorded in the office of the register of conveyances, the original vendor has the right to act and proceed against the mortgaged property in the hands of the third possessor, as if it was still the property of the mortgagor. *Valetti v. Alpuente*, 15 L. R. 269.

70. Where a person buys an interest or share in a speculation of lands and town lots, which soon after suddenly decrease and fall greatly in value, from causes independent of any act or fault of the seller, he cannot resist payment of his notes or obligations, on the ground of failure of consideration. *Slidell v. McCoy's executors*, 15 L. R. 340.

71. A hope or expectation of gain or profit in some enterprise or speculation, may form the object of a contract of sale. *Id.*

72. On the dissolution of a sale the vendor is entitled, not only to take back the property, but to recover the fruits of the thing sold, during all the time the purchaser had it in possession, as the rent of a house and lot. *Derepas v. Shallus*, 15 L. R. 371.

73. The owner cannot interpose another person to bid in his property for him at a resale, so as to charge the *folle enchère*, or first purchaser, failing to comply with the terms of sale. He becomes himself the purchaser, and there is, in fact, no sale. *Banks v. Hyde*, 15 L. R. 391.

74. A vendor on his vendee's failing to comply, must take his choice, either to regain his property, or insist on the payment of the price, by instituting suit. *Id.*

75. Where a third person purchases in property at sheriff's sale, under an agreement to reconvey it when funds are placed in his hands to reimburse the price, and release him from his liability, the original owner or his representatives, cannot claim any right to the property, when the reimbursement has not been made or tendered. *Gravier's curator v. Lartet et al.*, 15 L. R. 400.

76. The signature of a party to an act of sale, is proof that he accepted it. *Barker to use of Atchafalaya Bank v. Banks et al.*, 15 L. R. 453.

77. When there is no written evidence of the auctioneer's authority to sell, or the owner's assent, and the *procès verbal* is made out three or four years afterwards, by the clerk of the auctioneer acting as his attorney in fact, it is insufficient to compel a compliance on the owner of the property. *Short v. Knight*, 15 L. R. 483.

78. A tender of the notes or money to a notary not designated to draw up the act of sale, is insufficient to compel the owner to make a title in compliance with an adjudication. *Id.*

79. An act of sale passed before the commandant of *Pointe Coupée*, in 1774, in presence of two witnesses, wherein it is stated that the vendor did not sign, because he could not write, but it is mentioned that the title was delivered to the vendee, who took immediate possession of the land; such an act possesses the requisites of an authentic act under the Spanish law. *Devall v. Choppin et al.*, 15 L. R. 566.

80. Parole sales of immoveables have been repeatedly recognized under the Spanish law; and at that remote period, the ordinary mark of a party to an authentic act of sale, was not required. *Id.*

81. The acts of authority of a commandant, putting a settler in

possession of a part of the public domain, by a written permission or grant, showing the extent of the land conceded, and accompanied by proof of occupancy, will be considered *primâ facie* a good and sufficient title. The acts of an officer to whom a public duty has been assigned, are *primâ facie* taken to be within his power and authority. *Devall v. Choppin et al.*, 15 L. R. 566.

82. A sale by the husband to the wife, when made to replace her dotal and paraphernal effects is valid in law; and particularly when no fraud and collusion are alleged. It should not be attacked, unless on the ground of fraud and collusion. *Lambert v. Franchebois et al.*, 16 L. R. 1.

83. The purchaser at sheriff's sale is personally bound for the surplus of the adjudication, still secured by special mortgage on the property sold, and holds the surplus subject to the claim of the inferior mortgage creditors; and if he fails to pay, when it is demanded of him, he will be liable to be proceeded against as a third possessor. *Pepper et al. v. Dunlap*, 16 L. R. 163.

84. So, where a seizing creditor only sues for such instalments of a debt, secured by privilege or special mortgage, as are due, the property so mortgaged, is to be sold for *the whole of the debt*, on such terms of credit as correspond with the remaining notes and instalments not due, although such creditor is not the holder of them. *Id.*

85. The sale of a body of land, as a section or fractional section, described as containing a certain number of acres, is not a sale *per aversionem*, but of a limited body; and if there is a deficiency in the measure, or it comes short of the quantity sold, it must give way to the diminution of price proportionate to the quantity it is short, if it exceeds one twentieth part. *Phelps v. Wilson*, 16 L. R. 185.

86. A probate sale of the tract of land on which the deceased resided, as containing two hundred and twenty arpents, more or less, and described from boundary to boundary, is a sale *per aversionem* and the purchaser cannot obtain a diminution of the price, for any deficiency there may be in the measure. *Brazeale & Sewell v. Bordelon, administrator et al.*, 16 L. R. 333.

87. Co-proprietors of full age and capable of contracting, may consent to a sale at public auction; and although the proceeds may be applied to the payment of debts, yet, if the creditors do not interfere, such sale may be considered in the nature of a partition, without the aid of a Court. *Bray's executrix v. Bray*, 16 L. R. 352.

88. A party may sue for unliquidated damages, for the non-compliance with the contract of sale; and it is clear, in such a case, the Court of Probates would be without jurisdiction. It is the same if the party sues to compel a re-sale, at the risk of the purchaser, although the contract of sale arose under a proceeding nominally in the probate Court. *Id.*

89. Acts of sale *sous seing privé*, and not recorded in the Parish where the property is situated, are inadmissible as evidence of title to immoveable property. *Brosnaham et al. v. Turner*, 16 L. R. 433.

90. A bill of sale or written title is not necessary to transfer title to a ship, and parole evidence of a sale may be offered, connected with a written title made in pursuance of it. *Shields et al. v. Perry, McClure et al.*, 16 L. R. 463.

91. The demand of the notary and protest of the note for non-payment, is a sufficient putting in default to pay the price, to authorize a rescission of the sale of property. *Bourgeat v. Smith's syndics*, 16 L. R. 467.

92. Where it is expressed in the act of sale, that notes were received in payment, this expression will be taken in reference to other parts of the act, where it is shown a mortgage was retained, &c. In such cases, it is not such a payment as will prevent a rescission of the sale, in case of non-payment of the notes. *Id.*

93. The filing of notes given for the price of property, in a suit for the rescission of a sale, is a sufficient return of them to authorize the rescission. *Id.*

94. The articles 2543 of the Louisiana Code, contemplates the allowance of damages for waste and *deterioration* of property only, and not for the depreciation in the nominal value at the time of rescinding the sale. *Id.*

95. The sale of a tract of land claimed under a Spanish grant or other title, is not void because the United States refused to confirm it; or where it has been only confirmed in part, if it appears there has been no disturbance. *Rightor v. Kohn et al.*, 16 L. R. 501.

96. Where the thing sold turns out to be so defective that had the defects been made known to the purchaser, he would not have brought, the sale will be rescinded. *Melançon v. Robichaux*, 17 L. R. 97.

97. Even if the warranty is excluded, the seller is bound to disclose the defects or vices of the thing sold, to the buyer. *Id.*

98. Where the evidence shows the conveyance of a house and lot was made in fraud of creditors by the debtor, to a third person for an alleged price, the sale will be avoided. *Lopez's heirs v. Bergel, f. w. c.*, 17 L. R. 257.

99. Where the vendor sells all his right to the land back of that on which he resides, it will be considered a sale at the purchaser's risk, which implies no warranty, and the question of eviction and probable disturbance have no application to it. *Laville v. Rightor et al.*, 17 L. R. 303.

100. Where the price is not paid, the vendor may obtain a dissolution or rescission of the sale; and the Court will fix a day, on which if the price is not paid the sale will be rescinded. *Id.*

101. When the thing sold remains in the corporeal possession

of the seller, who is suffered to act as owner to the injury of a third person, the rule that the delivery of immoveables always accompanies the public act which transfers the property, ceases to be applicable. *Thibodeaux v. Thomasson et al.*, 17 L. R. 353.

102. A sale of plaintiff's *pretensions* to a tract of land, the title to which was in the United States, but both parties being ignorant that it had been comprized within the live oak reservation, and was not liable to entry, is an error in the motive sufficient to rescind the sale. *Theriot v. Chaudoir et al.*, 17 L. R. 445.

103. Where the price stipulated in a sale is large, and it is even doubtful as to the error in the motive, the Court will incline in favor of a party striving to avoid loss against one seeking to obtain gain. *Id.*

104. A promise to sell when the thing sold and the price of it are agreed on, is so far a sale, that it gives to either party a right to claim, *rectâ viâ*, the delivery of the thing or payment of the price; but the promise does not place the thing at the risk of the promisee, or transfer to him the ownership or dominion of it. *McDonald v. Aubert*, 17 L. R. 448.

105. Where the purchaser of a slave, at probate sale, remains in the undisturbed possession, and has paid part of the price it will be considered a ratification of the sale, and he cannot resist payment of the balance. *Stephenson's administrator v. Addison et al.*, 17 L. R. 454.

106. If a sale becomes valid by ratification of the purchaser, and the seller seeks payment, there can be no danger of eviction when no third party makes any claim. *Id.*

107. An appraisement of the identical property claimed, together with a receipt on the back of the execution, by plaintiff, that she received the amount of sale of the property seized by becoming the purchaser, is insufficient evidence of title to it, when the sheriff's deed is not produced, and there is no other evidence of an adjudication. *Bourgeois v. Bourgeois et al.*, 17 L. R. 494.

108. A lot of furniture under seizure is bought by an intervening party, who pays the debt, gives his note for the balance of the price, and takes the sheriff's receipt for the property *on storage*; *held*, that it is a *good sale and delivery*. The possession was given by the officer, who afterwards as agent of the purchaser took it on storage. *Chittenden v. Page et al.*, 18 L. R. 374.

109. The statute of 18th March, 1838, providing the mode of selling town-lots in New-Orleans for the payment of city taxes, applies to *non-residents only*; the sale of a property of a resident is a nullity. *Hodge v. Cleary*, 18 L. R. 514.

110. Where a judgment, execution and sale are produced, it is sufficient to convey the property, unless such error or fraud is pleaded and established as will set aside sales in ordinary cases. *Harman's heirs v. O'Moran et al.*, 18 L. R. 526.

111. A sale, where specified boundaries are given is *per aversio-*

nem, and includes all the ground between the points mentioned, whether the *measure be correctly* stated or not. *Harman's heirs v. O'Moran et al.*, 18 L. R. 526.

112. Where goods or property are *taken feloniously* no title is acquired by the felon, and he can convey none; but if the vendor delivers possession with the intent not only that *the possession* but the *property shall pass*, a *bona fide* purchaser from the fraudulent vendee will hold the property. His equity is greater from that of the original owner. *Russell v. Favier et al.*, 18 L. R. 585.

113. But where the owner of a slave puts her on hire, with *no intention of passing the right* of property to the bailee or lessee, the subsequent bad faith of the lessee selling the slave as his own, does not deprive the true owner of his property or give title to an innocent purchaser. *Id.*

114. The adjudication is the completion of a sale, so as to invest the purchaser *as owner*, and with right of possession of the thing sold. *Municipality No. 1 v. Cordeviolle & Lacroix*, 19 L. R. 235.

115. So the adjudication entitles the vendor not only to damages for non-compliance, but to an action for the price. *Id.*

116. The sale is perfect between the parties, and the property is acquired to the purchaser on an agreement between them, as to the object sold and the price even without delivery. *Id.*

117. The purchaser may retain the price, when he is in danger of eviction from a previous claim on the property, except where he has been informed of it, before the sale. A claim resulting from an act of the legislature, comes within the exception, as ignorance of it cannot be pleaded. *Id.*

118. A claim of the Draining Company on land for its improvement, is not adverse or a disturbance of possession. *Id.*

119. Purchasers cannot complain of the failure of the vendor to pass an act of sale, when it was caused by their own acts, in directing the notary not to give up their notes. *Id.*

120. When the evidence shows, that the sale from the defendant to the intervenors was only to give the latter a colorable claim to the property (or cotton), the sale was held to be made for the purpose of protecting it from the pursuit of creditors, and void. *Hamer & Co. v. Lawrence et al.*, 19 L. R. 58.

121. In the sale of property subject to an annual tax, the purchaser takes it subject to all the tax *accruing* after the sale; the vendor being liable for all due up to the time of sale. *Gourjon, f. m. c. v. Holmes et al.*, 19 L. R. 232.

122. Where the seizure is made and notice given on the 21st June, and the advertisement is dated the 24th of the same month, it will be considered as one day too early. Three days should intervene between the notice of seizure and the advertisement. *R. McCarty v. J. P. EcCarty*, 19 L. R. 300.

123. The sale of real property cannot be legally made by the sheriff until the 34th day after seizure. But if this time is given, it

cannot be objected that the advertisement was posted up a day or two sooner than was required. *R. McCarty v. J. P. McCarty*, 19 L. R. 300.

124. A clerical error in the description of a piece of land in the sheriff's advertisement of the sale, not calculated to mislead the party interested, is immaterial. *Id.*

125. Where a party shows a judgment, execution, sheriff's return thereon, and deed of sale, it is *prima facie* evidence of a valid alienation; and the party attacking the sale must show the forms of law have not been complied with. *Walker v. Allen et al.*, 19 L. R. 307.

126. If a purchaser at sheriff's sale does not offer good security, the sheriff must sale again immediately. If he gives any delay, it is at his own risk, and he will be liable in damages to the plaintiff in execution, if any are sustained in consequence of such delay. *Id.*

127. The vendee in a conditional sale, or *vente à réméré*, has a greater analogy to a usufructuary than to any other bailee of the property of another, as regards the fruits or encrease. *Patterson v. Bonner*, 19 L. R. 508.

128. Neither the usufructuary or vendee in a sale *à réméré*, can make the children or young of slaves, born during their possession, their own. *Id.*

129. Where there are ambiguities in the boundaries and corners of a tract of land in controversy, between the defendant and plaintiffs, as vendor and vendees, occasioned by leaving blanks in the notarial act of sale, a private acte previously executed between the same parties, will be received in evidence to explain and show the true boundaries and corners, when it is not inconsistent with the notarial act. *Labauve et al. v. Declouet*, 19 L. R. 376.

130. Where a tract of land is sold as 4 *arpents front with about 35 or 40 in depth*; the front to begin at a certain point, and the tract is *bounded on both sides* by plantations, it is a sale *per aversionem*, and the boundaries, will control the enumeration of quantity. *Prejean v. Girqir et al.*, 19 L. R. 422.

131. A sale by the father to his son, not a creditor, of his estate, at a sound price, where there is no privity between the latter and the creditors of his father and none between the father and his creditors, is *valid*, although the father was insolvent at the time, and the son agreed and did apply the *price* to the payment of a portion of the creditors. Nor is the mere relationship of the father and son, evidence of fraud. *Maurin & Co. v. Rouquer et al.*, 19 L. R. 594.

132. The sale would be good as to the son, even if it was the intention of the father to defraud his creditors, because the contract of sale was onerous and the purchase made for the full value of the property. *Id.*

133. A sale is complete as to the parties, as soon as the terms are agreed upon; but as to third persons, a delivery must take

place before their rights can be affected. *Copley v. Dowell, executor*, 1 R. R. 26.

134. On the sale or transfer of a debt, delivery is effected as to third persons by notice to the debtor of the transfer. *Id.*

135. Where vendor and vendee live in the same house, possession follows title. *Wafer v. Pratt, sheriff, and another*, 1 R. R. 41.

136. The acknowledgment of delivery made by the vendor of certain slaves in the deed of sale, is sufficient against a naked possessor without title. *Cawthorn v. W. N. T. McDonald*, 1 R. R. 55.

137. Improvements made on the public lands may be sold, and are a good consideration for a note, though such sale gives no title to, nor any lien or privilege on the land, independently of the rights conferred by the laws of the United States. *Ratcliff v. Bridger*, 1 R. R. 57.

138. A designation in the act of sale, by the purchaser of an estate subject to a servitude of way, of the place for the exercise of the right, is a sufficient delivery of the way to support a plea of prescription for non-user. *Delacroix v. Nolan*, 1 R. R. 321.

439. Where by an agreement among the heirs, the community property is adjudicated to the widow, on the condition of her paying the portions due to each of the heirs, such adjudication amounts to a sale, and vests the estate in her. *Winchester v. Cain and another*, 1 R. R. 421.

140. Any irregularity in the adjudication to the widow of the interest of a minor heir in the property of a community, can only be taken advantage of by such heir or by those claiming under him *Id.*

141. An exchange of a military site for other land, is valid as a sale, under the act of the 3d of March, 1819, authorising the sale of certain military sites. An exchange is, in effect, but a double sale. *Culliver v. Berge and another*, 1 R. R. 427.

142. Where a vendor, between whom and the defendant no privity exists, sells to the agents of the latter, goods known to be for the use of their principal, but looks to such agents exclusively for payment, and after the failure of the latter to pay, suffers more than fifteen months to elapse before applying to the principal, during which time he had settled with his agents, the principal will not be liable to such vendor. *Newcastle Manufacturing Co. v. Red River Rail Road Co.*, 1 R. R. 145.

143. Agents or factors residing in a foreign contry are personally liable upon all contracts made by them for their employers, whether they describe themselves as agents, or not, in the contract. In such cases it is presumed that the credit is given exclusively to them, to the exoneration of their employers, but this presumption may be rebutted by proof that the credit was given to both or to the principal only. *Id.*

144. The vendor of slaves sold in a lump, received from the pur-

chaser a note for the price, endorsed by a third person as surety for its payment, and subsequently purchased from his vendee a part of the slave: *held*, that the vendor's privilege, and the surety's right of subrogation to it, were indivisible; that the latter existed entire as to all the slaves, for the full amount of the debt; and that it could not be divided and restricted to certain slaves, for certain amounts, at the will of the original vendor, and that by such repurchase the endorser was discharged. Had the vendor repurchased all the slaves, his privilege would have been extinguished by confusion; and the subrogation to which the surety would be entitled on paying the price, would have become impossible. *Hereford v. Chase*, 1 R. R. 212.

145. Defendants purchased of plaintiff certain shares of the stock of a Bank just incorporated, for which they bound themselves to pay a *premium* of so much a share, provided the institution should go into operation by a time fixed in the contract; the vendor finding that the Bank could not go into operation unless an arrangement were made which required a reduction of the number of shares allotted to each subscriber, consented to such reduction, in consequence of which he was unable to deliver the whole number of shares he had contracted to furnish: *held*, that as the reduction was brought about by his own act, he was only entitled to recover the premium agreed upon, for the number of shares he was enabled to deliver. *Seghers v. New-Orleans Improvement and Banking Co.*, 1 R. R. 239.

146. The purchaser of a slave who had given his note for the price, and afterwards sold to a third person who binds himself to pay the note due to the original vendor, when sued by the latter will be entitled to a delay to cite such third person in warranty. *McClure and another, executors v. Copley and another*, 1 R. R. 133.

147. In an action by the endorsee against the maker and endorser of a note given for the price of a slave, evidence that the slave has instituted a suit for her freedom, will not entitle the defendant to a continuance until such suit can be decided; but, at most, to a suspension of the payment of the price, until security is given according to art. 2535 of the Civil Code. *Dussin v. Charles and another*, 1 R. R. 195.

148. It is not necessary that the purchaser should be actually dispossessed, to constitute an eviction. It may take place where he continues to hold the property, if under a different title from that transferred to him by his vendor, as where he inherits it, or acquires it by purchase from the true owner. *Landry v. Gamet*, 1 R. R. 362.

149. Where a tract of land purchased by defendant from the plaintiff, was seized and sold for a debt due by the latter, as curator of a minor, and defendant became the purchaser: *held*, that defendant continued to hold under the title of his original vendor, the sheriff's deed purporting to transfer to him nothing more than

the title of the latter, and that such purchase cannot be viewed as an actual eviction, authorising the vendee to refuse the payment of the price, or to recover it back when paid; and that it can give him no other or greater rights than he would have had, if, to avoid being dispossessed, he had paid the debt of his vendor, in which case he would have had an action of warranty for the reimbursement of the amount paid. *Landry v. Gamet*, 1 R. R. 362.

150. Though it may well be doubted, whether, in a regular hypothecary action, the party in possession is bound to give notice of the seizure to his vendor, as demand must be made of the principal debtor thirty days before resorting to the mortgaged property in the hands of a third possessor, which may be considered as sufficient notice, yet where the property is seized in the hands of the latter, under the decree of a Court having no jurisdiction to order said seizure, *ratione materiæ*, it will be his duty to resist such illegal process or to notify his vendor. *Id.*

151. Where a slave dies of a disease contracted since the sale, but before any redhibitory action, the loss must be borne by the purchaser. *Kiper, administrator v. Nuttall and another*, 1 R. R. 46.

152. Death from a congestive fever contracted since the sale, is a fortuitous event within the meaning of art. 2511 of the Civil Code. *Id.*

153. Where a slave had been sick for several days, and no physician had been called until within three hours of her death, such neglect will prevent a recovery of her value, though she may have been affected with a redhibitory disease. *Id.*

154. A purchaser is bound to take such care of the thing sold which he intends to return, as might be expected from a prudent father of a family. *Id.*

155. The action of rescission for lesion, was intended for the protection of those, who have been driven by their necessities, or have through weakness or improvidence, suffered a loss on the sale of land of more than half its value. *Copley v. Flint and another*, 1 R. R. 125.

156. Plaintiff was purchaser of a piece of land containing two thousand acres, and valued six thousand dollars, belonging to an absentee, sold by order of the police jury to defray the expense of repairing a road passing through the tract, for two hundred and seventy dollars; afterwards sold his title, without warranty, to defendants, for twelve hundred and fifty dollars; part of this amount not being paid, he tendered what had been received, with interest, and prayed for a rescission of the sale on the ground of lesion beyond a moiety, or for a judgment for the balance of its value: *held*, that plaintiff's object being to make a further profit, and not to protect himself from the consequence of his own weakness or improvidence, he did not bring himself within the provisions of the Code, and that an action of lesion would not lie. *Id.*

157. In a redhibitory action for the rescission of the sale of a slave, an offer to return the slave is sufficient, if rejected, without an actual tender. *Armstrong v. Mooney*, 1 R. R. 167.

158. Where an applicant for the purchase of certain public lands, under an act of Congress authorising the sale of such lands, *when vacant*, does not disclose to the register of public lands, or to the receiver of public moneys, the fact that they were occupied at the time of his application, the validity of the sale may be inquired into, without any previous proceeding on the part of the United States to annul it. The Court is bound to presume that the officers of the government would not have sold the lands, had they known that they were occupied, and to declare the sale a nullity. *Landry v. Gautreau*, 1 R. R. 372.

159. In an action for the rescission of the sale of a slave, on account of a redhibitory disease, existing at the time of the sale and of which he subsequently died, there will be judgment for the defendant, where it is proved that such slave had not received from the plaintiff the attention and care which his situation required. *Palmer v. Taylor and another*, 1 R. R. 412.

160. Plaintiff having obtained a decree for separation of property, from her husband, purchased a slave in her own name. Five months after the decree, the slave was seized at the suit of creditors of the husband; and seven months after the seizure, she took out execution against the husband. The creditors alleged that the slave was seized in the possession of the husband, and was paid for by money furnished by him; and no evidence was offered to disprove these allegations. *Held*, that an attempt to execute the decree of separation after such a length of time, could not affect the rights of the judgment creditors; that the decree was forfeited, and the community not dissolved; that the property having been purchased in the name of one of the spouses, belonged to the community, and was liable to seizure for the debts of the husband; and that there was no necessity for the creditors to institute a direct action against the wife, to annul the sale. *Bertie v. Walker, sheriff*, 1 R. R. 431.

161. Both the debtor and his vendee, must be made parties to an action to annul a sale, alleged to have been made in fraud of the rights of the plaintiff as a privileged creditor. *Potier v. Harman and another*, 1 R. R. 525.

162. One who has sustained no injury by a sale, has no right to annul it, though it may have been intended to defraud him. *Potier v. Harman and another, re-hearing*, 1 R. R. 527.

163. Action to rescind the sale of a tract of land; verdict for the plaintiff for the land, and in favor of defendant and reconvenor for the purchase money; and decree accordingly, declaring the land to be the property of the plaintiff, and ordering the defendant to put him in possession, on his paying the purchase money: *held*, that the decree contains two distinct judgments, one in favor of the

plaintiff for the land, and the other for the defendant for the price ; that the right to have it executed is reciprocal ; and that both parties, must be placed on the same footing ; and that the defendant may take out an execution for the price, though the plaintiff may not have demanded the execution of the judgment in his favor. *Black v. Catlett and another*, 1 R. R. 540.

164. Joining in the sale, and signing the sheriff's deed for property sold under a *fiери facias*, does not amount to such an acquiescence in the judgment, or voluntary execution of it, as will deprive the party of the right to appeal. It would amount at most to the waiver of a monition so far as he was concerned. *Printice v. Chewning*, 1 R. R. 71.

165. A sale of property under execution on a judgment from which no suspensive appeal has been taken, will divest the title of the owner, though the judgment be afterwards reversed. *Williams v. Gallien*, 1 R. R. 94.

166. A sale of property by the sheriff under an execution, after the judgment has been satisfied, will give no title. *Id.*

167. Where a judgment has been rendered in favor of the plaintiff, the whole judgment including the costs, is his property. He is supposed to have advanced, or to be liable for the costs, and the sheriff has no right, in violation of the orders of the plaintiff or his attorney, to sell the property seized, in order to secure their payment. Such a sale will be void. *Id.*

168. Workmen or others having a privilege on improvements erected on ground on which the vendor has a mortgage, cannot cause such improvements to be sold separately from the ground on which they stand ; they must be sold together, in order that the highest price may be obtained, to be divided between the parties, according to appraisement. The proceeds of the improvements to the parties having a privilege on them, and any surplus, with the price of the land, to the vendor. *McDonough v. Le Roy*, 1 R. R. 173.

169. The prescription of five years, established by the act passed the 10th of March, 1834, and promulgated the 28th of April following, in favor of purchasers at public sales, runs from the day of sale ; but where the sale was made before the passage of the act, prescription must be reckoned from the day of its promulgation. *Bourg and others v. Monginot and others*, 1 R. R. 331.

170. A debtor who has surrendered his property to his creditors, cannot, after the proceedings in insolvency have been closed, interfere and set aside a sale, by the syndic, of property in the hands of an innocent purchaser. *Smith and another v. de Lalande and another*, 1 R. R. 384.

171. Strict compliance with the law, and the police regulations, must be shown, to legalize a sale of land by commissioners of roads and levees, made to pay for work done thereon. *Winchester v. Cain and another* 1 R. R. 421.

172. Under the act of the 15th of March, 1830, the owner of lands sold for taxes due to the State, may redeem the same, in the case of non-residents at any time within two years, and in all other cases within one year. *Winchester v. Cain and another*, 1 R. R. 421.

173. The law authorising the redemption of lands sold for taxes, will be interpreted liberally. *Id.*

174. A sale *per aversionem* conveys all the land between the designated boundaries, without regard to the number of acres mentioned; but the sale of a tract of a certain number of acres, between certain limits, qualified by the expression so as to include the said number of acres, will not be considered a sale *per aversionem* but a sale of the number of acres specified. *Hoover, tutor v. Richards and wife*, 1 R. R. 34.

175. One against whom a litigious right has been purchased, may be released therefrom, by paying the transferee the real price of the transfer, with interest from its date. *Winchester v. Cain and another*, 1 R. R. 421.

176. The power to sell or compromise, must be express and special, C. C. 2966. *Bonneau v. Poydras*, 2 R. R. 1.

177. Art. 2242 and 2417 of the Civil Code, which provide that a sale of immoveable property shall have effect against third persons, only from the day when it was registered in the office of a notary and the actual delivery of the thing took place, do not apply to titles derived from the United States, which has offices of its own for the disposition of its domain, and for the preservation of the records of whatever is done in relation thereto. *Kittridge v. Breaud*, 2 R. R. 40.

178. Payment of the price is not assential to the contract of sale. *Slocomb v. Real Estate Bank of Arkansas*, 2 R. R. 92.

179. A wife can in no case sell to her husband, nor contract towards him the obligations of a vendor, though the husband may, in some cases, sell to her. She cannot consequently, be cited in warranty by the representative of her deceased husband. *Wherry v. Bell*, 2 R. R. 225.

180. Each of the joint owners of a steamer, or other vessel, holds an undivided share, which he may dispose of without consulting the others; but neither can sell the interest of a co-proprietor without his consent. *Byrne v. Hooper*, 2 R. R. 229.

181. Defendant purchased certain shares of stock in the Union Bank of Louisiana, binding himself to pay plaintiffs a balance due thereon by his vendor. In the contract of sale, the latter bound himself to transfer the stock to defendant on the books of the bank. On an application to the board of directors, under the 29th section of the act of 2d April, 1833, incorporating the Bank, to allow a transfer of the stock, the proposition was approved by a majority of the board, as required by law. The Bank having subsequently sued for the amount due on the stock assumed by defendant, the

latter pleaded that he could not be made liable till the stock was transferred to him. *Held*, that the stipulation that the vendor should transfer the stock on the books of the Bank, meant only that he should cause the defendant to be recognized as a stockholder on its books, and that the contract was complete as to all parties interested, on the execution of the act of sale made under the authority of the directors. *Union Bank of Louisiana v. Desban*, 2 R. R. 486.

182. The vendee may, generally, establish the sale, by proof of the acts and admissions of his vendor. Where fraud is suspected, the admissions of the alleged vendor, must be received with caution, but cannot be absolutely rejected. *Planters Bank of Mississippi v. Crane*, 2 R. R. 489.

183. A fixed price is one of the legal requisites of a contract of sale; and though it be agreed that the price shall be fixed by a third person, if it become impossible, or be not done, the contract will remain imperfect. *Tiernan v. Martin*, 2 R. R. 523.

184. Defendants advertised for sale, the hull, spars, sails, and rigging, of the schooner Louisiana, lying high and dry on a certain island. The advertisements represented, that she was well found, her sails unbent, and her running rigging stowed below; that there was some cargo on board which might entitle the purchaser to an advantageous salvage; and that she was left in the charge of three trusty persons. Plaintiffs purchased, and four days afterwards proceeded to the wreck, which they found at a different place from that advertised, and burnt to the water's edge. A witness deposed that it had, from all appearances, been burnt before the sale. *Held*, that if the burning occurred before the day of sale, there was no sale (C. C. 2430); if after, but before possession could have been taken with reasonable diligence, that defendants were liable, under articles 2443, 2444, for the acts or neglect of the persons they announced as keeping her; that the delay of four days was not unreasonable; and that defendants having, to enhance the price, made representations, in the nature of a warranty, calculated, to mislead the purchaser, were responsible for the expenses to which the latter were subjected through their fault. *Bataille v. Firemen's Insurance Company*, 2 R. R. 60.

185. A party having purchased of plaintiffs a quantity of flour for cash, to be shipped on a vessel bound to a foreign port, it was delivered on board and receipts taken for it in the name of the plaintiffs. The purchaser never paid for the flour; but obtained from the master of the vessel, to whom he consigned it, bills of lading thereof, without having produced the receipts given to the vendor, and an advance to be repaid with commission and freight. In an action by plaintiffs against the master to recover the flour: *held*, that it is an established usage, where goods are purchased for cash to be shipped for exportation, for the vendor to take the receipts of the officers of the vessel in his own name, to be delivered to the purchaser when the price is paid, that the latter may obtain a bill of

lading from the master on their production; that the possession of flour never ceased to be in the plaintiffs; and that the master acted in his own wrong in giving a bill of lading to the purchaser and in making advances before delivery to the latter had been effected by the surrender of the dray receipts to him. *Landis v. Darling*, 2 R. R. 70.

186. Where no place is designated for the delivery of articles ordered of a manufacturer, delivery is to be made at the place where they are manufactured. *Leeds v. Bredall*, 2 R. R. 105.

187. Plaintiff attached certain cotton as the property of defendants. Proof that it had been previously sold by defendants to intervenor, who had given a note for the price, which was protested at maturity, and still unpaid. The sheriff's return showed that he had attached seventy bales of cotton, which was subsequently released on the execution of a bond by the consignees. Urged, on behalf of plaintiffs, that though the attachment could not hold the cotton, it was good as to defendants' privilege as vendors. *held*, that the return showed that no such right had been attached; and that the lien, if any existed, attached to the cotton, which had been sold. *Slocumb v. real estate Bank of Arkansas*, 2 R. R. 92.

188. The owners of the notes executed each for a portion of the price of property, and secured by the same mortgage, are entitled to be paid out of the proceeds of the property, in proportion to the amount of the notes owned by them respectively. *Salzman v. his creditors*, 2 R. R. 241.

189. Under the Code of 1808, book 3, title 19, art 77, the vendor's privilege was postponed to the law charges in general. By the new Code, the vendor is paid out of the proceeds of the thing sold before other privileged claims, except the charges for affixing seals, for making inventories, and others necessary to procure the sale of the thing. C. C. 3234. *Monrose v. his creditors*, 2 R. R. 280. *Lauve v. his creditors*, 2 R. R. 527.

190. The holder of a note given for the price of a slave, will be entitled to interest from maturity, though the note contained no stipulation to that effect, and was not protested. C. C. 2531, 3532. *Gay v. Kendig*, 2 R. R. 472.

191. Though the creditors of an estate, the property of which has been sold by order of Court to pay their claims, are not, technically, warrantors of the purchaser, yet as their obligation to repay the price distributed among them depends on the eviction of the latter, their situation is analogous to that of a vendor, and they should be made parties to the action against the purchaser. The latter cannot be compelled to bring as many actions, in their different parishes, as there may be creditors liable to refund. *Rivas v. Hunstock*, 2 R. R. 187.

192. In an action against the purchaser of property sold under a *fieri facias*, the parties to the original suit may be cited in warranty. Having received the purchase money, if the consideration

of the sale fail by the eviction of the purchaser, they will be bound to refund: and their liability must be regulated by articles 2599 of the Civil Code and 711 of the Code of Practice. *Rivas v. Hunstock* 2 R. R. 187.

193. By art. 2602 of the Civil Code, all the warranties to which private sales are subject, exist against the heirs in judicial sales of the property of successions. *Aliter*, as to the creditors, on the sale of the property surrendered by an insolvent. The heirs are warrantors to the fullest extent, being owners and vendors, while the creditors are neither. The latter are only responsible, severally, for the restitution of the proceeds of the sale of the property received by them. *Id.*

194. The omission by a purchaser, to notify his vendor, or those who are responsible to him in case of eviction, of the action instituted against him, will not, under art. 2494 of the Civil Code, and 388 of the Code of Practice, release the latter, unless they can show that they had means to defeat the action, which were not used owing to their not having been cited in warranty, or apprized of the institution of the suit. By the word *means*, in art. 2494 of the Civil Code, must be understood new facts, or peremptory exceptions, which, if presented to the Court, would have produced a different result. It will not be sufficient to show that there was error in the judgment, for the same judgment would have been pronounced against them, had they been cited. *Id.*

195. Where the holder of a claim secured by mortgage, assigns a part of it, he cannot come in competition with his assignee, if the property prove insufficient to pay both. Though the warrant only the existence of the debt at the time of the transfer, it would be contrary to good faith, to permit him, after receiving the price from his assignee, to prevent the latter from recovering the amount paid by him. *Salzman v. his creditors*, 2 R. R. 241.

196. Where after a protracted illness, a disease, which existed at the time of the sale, assumes a new and different character, and finally causes the death of a slave, there may be reason to doubt the vendee's right to recover in a redhibitory action. *Aliter*, where the evidence proves that the death was the consequence of the original disease. *Lyons v. Kenner*, 2 R. R. 50.

197. Defendant having purchased a lot of negroes, in other respects sound, on placing them in the rail-way cars to be transported to his plantation, a distance of sixteen miles, discovered in one of them the first symptoms of the measles. The one thus affected was not separated from the rest, either in the cars or on his plantation, and no physician was sent for until four days had elapsed, when another was found ill of the same disease. Both of these, and two others, died of the disease. In an action by the vendor for the price: *held*, that the measles is not an incurable malady; that defendant, by neglecting to separate the sick girl from the other slaves after notice of the disease, and by omitting to call in medical aid

at once, failed to act as a man of ordinary prudence would have done; and that the presumption created by sect. 3 of the act of 2d January 1834, as to slaves who have been less than eight months in the State that any redhibitory malady, which displays itself within fifteen days after the sale, existed on the day thereof does not apply to such a case. *Lyons v. Kenner*, 2 R. R. 50.

198. To recover in a redhibitory action, a purchaser must show that he acted with, at least, ordinary care and attention, and that no act or omission of his could have occasioned the loss he attempts to throw upon his vendor. *Id.*

199. Proof of circumstances calculated to create doubt as to the fairness of the transaction, will not be sufficient to set aside a sale. *Slocomb v. real estate Bank of Arkansas*, 2 R. R. 92.

200. Two things are necessary to constitute fraud: the intention to defraud, and actual loss or damage, or such strong probability of it as will induce a Court to interfere. *Id.*

201. An action to rescind a contract of sale made by an insolvent, on the ground of its having been executed with intent to give a preference to certain creditors, is prescribed by one year. C. C. 1982. *Robinson v. Shelton*, 2 R. R. 277.

202. Simulated or fraudulent sales cannot be inquired into, by commencing by seizure and treating them as nullities. *Le Goaster v. Barthe*, 2 R. R. 388.

203. A sale *à la folle enchère*, must be on the same terms and conditions as the first, or it will be annulled. *Gallier v. Garcia*, 2 R. R. 319.

204. The sale of a tract of land described as having seventeen *arpens* front on the river, by a depth determined by the titles, bounded on the upper side by the plantation of D., and on the lower by that of L., is a sale *per aversionem*; and having been made with reference to known and definite boundaries, conveys nothing more than is contained within those limits, and a deficiency in quantity will not entitle the purchaser either to a rescission of the sale or to a diminution of the price. C. C. 2471. *Saulet v. Trepagnier*, 2 R. R. 357.

205. Where one who sells a certain quantity of land, afterwards fixes the boundaries himself, the purchaser will take all the land between the boundaries. C. C. 850. *LeBreton v. McDonough*, 2 R. R. 461.

206. The purchaser at a judicial sale of the property of a succession sold for a debt due by the ancestor, will, where the proceedings have been fairly conducted, acquire a title good against an heir who may subsequently make himself known. *Wherry v. Bell*, 2 R. R. 225.

207. Where property sold under execution at twelve months' credit, and conveyed to the purchaser, is resold on account of the failure of the latter to pay the price, the first purchaser, or his heirs alone, can avail themselves of any irregularities in the second sale.

The original owner, having been divested of his title, by the first adjudication, cannot take advantage of any illegality in the second sale. *Drouet v. Rice*, 2 R. R. 374.

208. A scrawl, enclosing the letters L. S., affixed to a *fi fa.*, will be good as a seal, where, from being used in other writs issued from the same Court, it is to be presumed that the Court had no engraved seal. *Id.*

209. A sheriff's deed, under the act of 10th April, 1805, headed with the title of the suit under which the property was sold, and referring to the *fi. fa.* which recites the judgment and mentions the Court by which it was rendered, contains a sufficient reference to the judgment under which the writ was issued. *Id.*

210. After the lapse of twenty years, the legal presumption is in favor of the acts of sheriffs. Proceedings for the forced alienation of property under the former laws of this State, will not be scrutinized with the same rigor as those under the present system, the formalities required by which are well defined in the Code of Practice. *Id.*

211. Under the act of 10th March, 1834, all formalities connected with any public sale by a parish judge, sheriff, auctioneer, or other public officer, are prescribed by the lapse of five years. *Id.*

212. A sale by a sheriff of an immovable, seized under a *fi. fa.*, is void as to third persons not proved to have had actual notice, when it has not been recorded in the office of the register of conveyances as required by law. *Murphy v. Jandot*, 2 R. R. 378.

213. A purchaser who shows a judgment, execution, and sale under which he holds, has a title sufficient to acquire by the prescription of ten and twenty years; and no informalities in the sale can affect his title, where he has possessed under it the time required by law to acquire the property by prescription, before such informalities were set up. *Walden v. Canfield*, 2 R. R. 466.

214. The vendor of a tract of land is bound to put the purchaser in possession; and where he sells at different times by separate portions, without boundaries, to different persons, the first purchaser must be satisfied before a second can obtain any portion of his. *Wells v. Compton*, 3 R. R. 171.

215. Where real property is purchased by a commercial firm, the members of the firm become joint owners thereof; and it cannot be alienated by one partner, without the consent of the rest. C. C. 2796. But where the latter, by receiving a portion of the price, subsequently ratify a sale by the former, they will be estopped from asserting any title to the prejudice of a *bonâ fide* purchaser. *Thomas v. Scott*, 3 R. R. 256.

216. The act of receiving the whole or a part of the proceeds of property, sold without authority, amounts to a ratification of the sale, and will preclude the owner from disturbing the purchaser. *Id.*

217. A vendor may refuse to deliver the thing sold, though he

may have granted a term for the payment, where, from the absconding of the vendee, he would be in imminent danger of losing the price. C. C. 2464. *Cook v. West*, 3 R. R. 331.

218. A sale is perfect between the parties, as soon as they agree as to the thing and the price. As to third persons, the property of the thing sold passes to the vendee, only by delivery. *Id.*

219. A vendee who has not received the thing sold, nor paid the price, can transfer to a third person only his right to require the delivery of the thing on the payment of the price, or on giving security for its payment at the time agreed on. *Id.*

220. One who stands by and sees his property sold as belonging to another, will not be permitted to set up his title in opposition to a *bonâ fide* purchaser, who has bought on the faith of his declarations or apparent acquiescence. *Aliter*, where the purchaser knew the extent of the rights of the claimant, and was not misled by the acknowledgments so made. *Id.*

221. Where the record does not show whether a slave sold was delivered to the vendee, at the time of the adjudication, or after the execution of the notarial act, it will be presumed that the vendor retained possession until the act of sale was passed. C. C. 2588. *Hivert v. Lacaze*, 3 R. R. 357.

222. A sheriff has a right to retain possession of property sold by him, during the pendency of a rule to show cause why the sale should not be set aside. *Bayon v. Breedlove*, 3 R. R. 383.

223. Parole evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale. *Bell v. the Firemen's Insurance Company of New-Orleans*, 3 R. R. 423. *Bell v. Western Marine and Fire Insurance Company*, 3 R. R. 428.

224. One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk. *Id.*

225. A purchaser, fully aware of the danger of eviction at the time of the purchase, cannot resist payment of the price on the ground of eviction. C. C. 2481. *Estill v. Holmes*, 3 R. R. 134.

226. Action by the payee on a promissory note. Defendant answered, pleading a failure of consideration, and alleging that the note was given in error, for the price of a tract of land, purchased by plaintiff from a person to whom defendant had previously sold it. In an amended answer, filed at a subsequent term, he averred, that the note was executed for the price of a tract of land belonging to the United States, to which plaintiff pretended to have a pre-emption right, and which he bound himself to convey by a good title to defendant; that the plaintiff had no pre-emption right to the land; and that the United States had sold the land to a third person, which sale had come to defendant's knowledge, since the last term of the Court. The sale by the United States was established. *Held*, that defendant could not be allowed to gainsay the admissions originally made by him, and that he must be estopped by his warranty, as vendor, from

praying for a rescission on the ground of want of title in the plaintiff. Judgment in favor of the latter. *Estill v. Holmes*, 3 R. R. 134.

227. Art. 2535 of the Civil Code, which provides, that where a purchaser, who was not informed before the sale of the danger of eviction, is, or has just reason to fear that he will be disquieted in his possession, by any claim, he may suspend the payment of the price until he be restored to quiet possession, unless the seller prefer to give security, does not contemplate the case in which a purchaser's fear of being disquieted arises from a naked point of law. every one is bound at his peril, to know the law. *Hodge v. Moore*, 3 R. R. 400.

228. Where one assumes to sell without title, or without disclosing the defects in his title, the vendee, in good faith, though holding *a non domino*, may plead the prescription of ten years. Otherwise, where vendor sells only his right or interest, shows what it is, and declines to warrant generally, thus bringing home to the vendee a knowledge of his title. *Eastman v. Beiller*, 3 R. R. 220.

229. Where in a sale of goods, a time for payment is fixed, an agreement to pay interest may be implied. *Shaw v. Oakey and others*, 3 R. R. 361.

230. To put the purchaser in default, the vendor must tender for his signature an act drawn up in strict conformity to law, and such as the former is bound to sign. *Hodge v. Moore*, 3 R. R. 400.

231. Where in an action against the purchaser of property sold at auction who had failed to comply with the terms of the sale, for the difference between the price bid by him and that at which it was adjudicated on the second exposure, and for the expenses subsequent to the first sale, it appears that the act of sale prepared by a notary and tendered to defendant was unaccompanied with the certificate required by law, showing what privileges or mortgages existed on the property, the defendant will not be considered to have been put *in mora*. C. C. 2539, 3328. *Id.*

232. Action by the transferee of instalments due for the price of land. Defendant pleaded a deficiency in quantity, claimed a diminution of the price, and prayed that his vendors might be made parties, and condemned to refund a portion of the amount already paid. Judgment for the plaintiff, and appeal by defendant, the plaintiff alone being cited. *Held*, that the vendors stood towards the defendant in the capacity of plaintiffs, and should have been made appellees; and that the appeal must be dismissed for want of proper parties. *Moore v. Rutherford*, 3 R. R. 60.

233. Where the purchaser knew of the defects before the sale, no redhibitory action will lie. *Lebesque v. Bonin*, 3 R. R. 12.

234. A *brand* or herd of running cattle, advertised and sold as consisting of a certain number, amounted, in fact, to not more than a third. In an action for the price, defendants, having sold a part of the cattle, prayed for a rescission of the sale, or diminution of

the price. *Held*, that as defendants could not return all the cattle they had received, the sale could not be rescinded, and that a diminution of the price was properly allowed. *Richard v. Parrott*, 3 R. R. 75.

235. The express exclusion, in the sale of a slave, of warranty, except as to title, is not, as a general rule, equivalent to a declaration of unsoundness, and will not relieve the vendor from the obligation of disclosing redhibitory vices or maladies, not apparent, which he knows to exist; and the concealment of such defects will be fraud within the meaning of art. 2526 of the Civil Code. *Aliter*, where from the terms of the exclusion, the idea is conveyed that the slave was unsound; in such case, the exclusion will amount to a declaration of unsoundness. *Galpin v. Jessup*, 2 R. R. 90.

236. In an action for the price of a slave, the jury, if satisfied that he was addicted to theft, may either rescind the sale, or grant an abatement in the price. *Hawkins v. Brown*, 3 R. R. 310.

237. Parole evidence is admissible to show that the vendor made known, at the time of the sale, the defects of the thing sold. *Id.*

238. In all actions of rescission, the party seeking relief must have offered to restore his adversary to the situation he was in before the contract. *Tippett v. Jett*, 3 R. R. 313.

239. Proof of an offer by the vendor to annul the sale of a slave, on the payment of a certain sum, will exonerate the plaintiff, in a redhibitory action, from the necessity of proving a tender of the slave. The tender would have been useless, without the payment of the sum demanded. *Hivert v. Lacaze*, 3 R. R. 357.

240. Concealment by the vendor of a slave, of the fact that the intellect of the slave was not sound, is a fraud upon the purchaser, and will annul the sale. And so, though the sale was made, in the absence of the owner, by an agent aware of the defect. *Id.*

241. Concealment by the vendor of any vice or defect in a slave, is no fraud, unless such vice or defect would furnish ground for redhibition. *Gros v. Bienvenu*, 3 R. R. 396.

242. The purchaser of a slave, to entitle himself to the benefit of the third section of the act of 2d January, 1834, which provides that one who institutes a redhibitory action on the ground that the slave is a runaway or thief, shall not be bound to prove that such vice existed before the sale, when discovered within two months thereafter, where such slave had not been more than eight months in the State, must show that the slave has not resided therein for eight months preceding the sale. *Smith v. McDowell*, 3 R. R. 430.

243. The holders of notes given for the price of a tract of land, though not indentified with the sale by the *paraph* of a notary, will be entitled to a privilege on the thing sold. The *paraph* of the notary is not the only means by which the notes may be indentified. Their identity may be proved by his oath. *Succession of Johnson*, 3 R. R. 216.

244. Where the vendors of slaves have left them for a number of

years in the possession of the vendee, without taking any steps to preserve their privilege, they cannot assert it to the prejudice of the creditors who have obtained judgments against him, or received special mortgages from him. C. C. 3238. *Blackstone v. his creditors*, 3 R. R. 219.

245. In an action by the purchaser, at a sale under execution, of the undivided shares of certain heirs in a succession, against the administrator, for paying over the amount to the heirs after notice, the defendant cannot set up any irregularity or nullity in the original proceeding against the heirs; the payment is at his peril, and he will be liable over to the purchaser. *Noble v. Nettles*, 3 R. R. 152.

SALE FOR TAXES.

1. In a sale for taxes due the corporation of New-Orleans, by non-resident owners of lots, the name of the owner must, in all cases, be given and published in the proceedings. The designation that the owner is unknown, is insufficient to make such sale valid. *Carmichael v. Aikin's heirs*, 13 L. R. 205.

2. The debt or corporation tax due by non-resident owners of lots, must be proved, contradictorily with the attorney appointed to represent the absentee, and must be so stated in the judgment. *Id.*

3. In a forced sale for taxes on city lots, it is insufficient to designate the lots by *number alone*, and the squares in which they are situated. The extent and boundaries should be given. *Id.*

SEPARATION FROM BED AND BOARD.

1. Living unhappily together; having frequent differences, ebullitions and displays of temper, but without any personal or other violence; the want of supplies or necessaries according to the wife's demands; the non-payment of her bills promptly, and for the education of her daughter; the want of support according to her rank and fortune she brought into marriage, and supposed impossibility of the parties ever living together again, are not sufficient *causes of separation from bed and board*. *Rowley v. Rowley*, 19 L. R. 557.

2. During the pendency of a suit of the wife for a separation from bed and board, the wife may leave the home assigned her as a residence, on business, and be temporarily absent. *Id.*

3. A judgment for alimony may be given, even when no separation from bed and board follows. *Id.*

4. The Court may in its discretion, change the residence of the wife during the pendency of her suit for separation, *Rowley v. Rowley*, 19 L. R. 557.

SEQUESTRATION.

1. The Article 276, of the Code of Practice, pre-supposes that the affidavit in a case of sequestration, is to be made by the plaintiff; and when he is present, and no proper cause assigned to prevent him, the affidavit of the agent will not be sufficient. *Hawley v. Tarbe et ux.*, 14 L. R. 92.

2. An affidavit in which the plaintiff states, that *he fears* the defendant may remove the mortgaged slave out of the jurisdiction of the State, is insufficient to obtain an order of sequestration. He should *state the facts* which induce his apprehension. *Clark v. Glover et al.*, 14 L. R. 266.

3. The plaintiff, in obtaining an order of seizure and sale against the mortgaged premises, acquires a *lien* on the growing crop, from the moment of notification of the order of seizure to the defendant; and he may obtain a writ of sequestration against the crop during the pendency of a suspensive appeal from the order of seizure and sale, and in the absence of any principal demand before the Court at the time of granting the sequestration. *Williams v. Duer*, 14 L. R. 531.

4. A mortgage creditor is entitled to a writ of sequestration against the mortgaged property, whenever he apprehends it will be removed out of the State, before he can have the benefit of his mortgage; and in such cases a writ of sequestration can be granted in the absence of a principal demand pending before the Court granting it. *Id.*

5. A Court of Probates may order the sequestration of papers, belonging to a succession administered under its authority, when unlawfully retained by a third person. *Cordes, curator v. Clarke*, 1 R. R. 271.

6. Under the act of 20th March, 1839, section 6, a writ of sequestration may be issued in all cases, where one party fears that the other will conceal, part with, or dispose of the moveable or slave in his possession, during the pendency of the suit. To obtain such sequestration, it will suffice that the applicant make oath, that he fears and believes that the moveable or slave will be illegally disposed of by the defendant. *Dumonteil and others v. Dubroqua*, 1 R. R. 531.

7. A return of no property found after demand of the parties, made by the sheriff on a *feri facias* against the defendant, in an action in which sequestered property had been released on a bond, & sufficient evidence of a breach of the condition of the bond given

for the release of the property sequestered, in an action against the surety. *Massé v. Barthet*, 2 R. R. 69.

8. The rights of a creditor, claiming a privilege on property in the hands of a judicial sequestrator, cannot be determined without making such creditor a party to the suit. The judicial sequestrator does not represent him. *Bank of Alabama v. Hozey*, 2 R. R. 150.

9. Where property in the hands of a judicial sequestrator, has been seized under process from another Court than that which issued the sequestration, the former tribunal may pronounce upon the validity of the seizure, though it have no power to order a release of the sequestration. *Id.*

10. A sequestration, whether conventional or judicial, creates no lien or privilege. It is merely a conservative measure. The possession of the sequestrator is that of the party legally entitled to it; and in all cases the party against whom it has been obtained, may release the property, by giving bond with surety. *Id.*

SERVITUDE.

1. Where two estates are adjacent to each other, the one below owes to the other a natural servitude to receive the waters which run naturally from it, according to the principles settled in the case of *Martin v. Jett*, 12 Louisiana Reports 501. *Hebert v. Hudson & Lambeth*, 13 L. R. 54.

2. If the owner of the lower estate, owning the servitude, makes a levee or other obstruction to the natural flow of the water over his land from the upper one, the owner of the latter has his action to cause the obstructions to be removed. *Id.*

3. The estate below, owes a servitude to that above it, to receive the waters which naturally flow from the upper estate, and the proprietor below, is not at liberty to raise a dam, or make any work to prevent this running of the waters; but this must be a natural servitude, not created by the industry of man. *Lattimore v. Davis*, 14 L. R. 161.

4. The clearing of land and fitting it for agriculture, by cutting ditches and canals, cannot be considered as making this servitude more onerous, if it pursues the natural drains. *Id.*

5. But where the proprietor of the upper estate cuts ditches, and makes drains on the lower one, without following the natural drains and flow of the waters, he will be liable for all damages sustained by the overflow of the waters. *Id.*

6. The right of passage, and to use an open space in a town as a public street or alley, is not acquired by prescription. It is an interrupted servitude which requires the act of man to be exercised, and can be established only by a title. *Crossman et al. v. Vignaud et al.*, 14 L. R. 173.

7. The lower one of two adjacent estates, owes a servitude to the upper one, of allowing the waters to pass off from the latter through the natural drains over the land of the former. *Hays v. Hays*, 19 L. R. 351.

8. If the proprietor of the lower estate obstructs the natural flow of the waters of the upper estate he will be compelled to remove such obstructions at his costs. *Id.*

9. The proprietor of the estate owing a servitude, is bound to fix the place where he wishes it to be exercised, and until he does so prescription for non-user will not run. *Delacroix v. Nolan*, 1 R. R. 321.

10. A designation in the act of sale, by the purchaser of an estate subject to a servitude of way, of the place for the exercise of the right, is a sufficient delivery of the way to support a plea of prescription of non-user. *Id.*

11. The provision of art. 786 of the Civil Code, that the time of prescription for non-user begins, as to interrupted servitudes, from the day when they ceased to be used, cannot be construed to prevent prescription where the servitude has never been used. If such a servitude be lost by non-user during a certain time, it will *a fortiori* be prescribed where it has never been used at all, for the extinguishment by non-user is founded on the presumed abandonment of the right by the person entitled to the servitude. *Id.*

12. Where the prescription of non-user is opposed to the owner of the estate to whom the servitude is due, it is incumbent on him to prove that he or some one in his name, has used the servitude, as appertaining to his estate, within the time necessary to establish such prescription. *Id.*

SHERIFF.

1. Where a sheriff acts honestly, being a public officer, he must be protected against excessive and vindictive damages. *Smith v. Bradford et al.*, 14 L. R. 281.

2. So, where the sheriff illegally removed slaves by seizure from the plantation they were cultivating, a bare remuneration for the loss sustained, so far as it can be ascertained, should be adopted as the measure of damages. *Id.*

3. The damages for loss of time of slaves by illegal seizure and removal, should be estimated at the usual rates of hiring slaves. *Id.*

4. A sheriff's account for fees and charges need not be proved when not contested or required by the Court. The law provides that the fees for keeping personal property and slaves taken under legal process by the sheriff, shall be at the discretion of the Court. *Avart v. King et al.*, 14 L. R. 62.

5. The sheriff is without authority to seize and sell immoveable

property or slaves, under execution issuing by a justice of the peace, when the sum is less than fifty dollars. *Freeman, f. m. c. v. Watts, sheriff, &c.*, 15 L. R. 476.

6. The fact of the defendant in the execution pointing out immoveable property, will not authorize the sheriff to sell, though it may to distrain, and hire or farm it out. *Id.*

7. So, a sheriff suffering an escape of a debtor, arrested on mesne process, his responsibility is limited to the loss actually sustained by the plaintiff, and the actual loss must be ascertained before judgment. *Stinson, curator, &c. v. Buisson*, 17 L. R. 567.

8. It is not certain that an ex-sheriff could recover on a bond taken payable to himself as sheriff, after he is *functus officio*. *Buisson v. Hyde et al.*, 17 L. R. 19.

9. A sheriff having ceased to be a public officer, he has no right any longer to keep or collect any bonds given to him as sheriff, in execution of any order of Court. *Buisson v. Hyde et al., on a rehearing*, 17 L. R. 22.

10. The sheriff who sequesters property is bound to use the same diligence to preserve it as he would do for himself; and to use such care as will secure it for the benefit of the party to whom it is ultimately adjudged. *Parish v. Hozey, sheriff*, 17 L. R. 578.

11. So, where a bill of exchange is sequestered, the sheriff is bound to have it presented for payment at maturity, and if not paid, to have it protested, and due notice given to all the parties to it, otherwise he will be liable for the amount. *Id.*

12. Where a sheriff is in possession of property seized under execution, he must be considered a rightful possessor holding for the benefit of the plaintiff, until it is clearly shown that the property seized belongs to another than the defendant from whom it was taken. *Wafer v. Pratt, sheriff and another*, 1 R. R. 41.

13. Where the amount made under a *fieri facias* has been paid by the sheriff to the plaintiff in execution, before notice of the purchase of the claim to the proceeds by a third person at a forced sale, he will not be responsible to the latter. *Donohue v. Harding, sheriff*, 1 R. R. 69.

14. Notice to a sheriff by a third person, not to pay over money made under an execution to the plaintiff, will not render him liable, if given before the execution came into his hands. *Id.*

15. A sheriff who has levied an execution against one person on the property of another, will not be protected on an allegation that he acted to the best of his knowledge in the discharge of his duty as an officer. He must take care not to seize the property of A. on a writ against B. *Barney v. De Russy, sheriff, and another*, 1 R. R. 75.

16. The return of service of a summons to attend a meeting of the creditors of an insolvent who has surrendered his property, should be made by the sheriff as in the case of an ordinary citation; but where, by the neglect of the latter, no return has been

made, third persons will not be allowed to suffer, but a return will be ordered to be made *nunc pro tunc*. *McCormick v. Broadwell*, 1 R. R. 165.

17. One who retains money, deposited in his hands as sheriff, after he has ceased to act as such, will continue subject to summary process provided by law for the benefit of suitors where such officers are concerned. By retaining the money, which he might have deposited in Court, he keeps up his official relation with that tribunal. *Graham v. Swayne*, 1 R. R. 186.

18. Where property brings less than the amount of the mortgage of the creditor at whose suit it is sold, all subsequent mortgages fall to the ground, and the sheriff is authorised to erase them. *Hart and others v. Foley*, 1 R. R. 378.

19. A bond taken in the name of the sheriff, on a sale under execution, at twelve months' credit, is for the benefit of the judgment creditors; hence the law requires, if there be several such creditors, that as many bonds be taken as may be necessary to deliver to each party his just portion of the price. These bonds should be made out in the names of the different parties, among whom the price is to be divided. *Burthe and another v. Bernard*, 1 R. R. 395.

20. A bond taken in the sheriff's name, on a sale under execution, at twelve months' credit, is in his hands only as a deposit. He has no property in it, which he can transfer to any other person than the party for whose benefit it was taken. Where such a bond has been assigned to a third person, the parties entitled to it will have the same remedies against the assignee, as against the sheriff, had he retained it and received the amount. *Id.*

21. Where property has been seized under a *feri facias* before the return day, the sheriff is not obliged to return the writ at any particular time, unless he has sold the property; where the property has not been sold, he may finish what he has commenced, though the return day have expired. *Black v. Catlett and another*, 1 R. R. 540.

22. Where a *feri facias*, under which property has been seized, is ordered by the plaintiff to be returned into Court before the property is sold, the proceeding under the writ will be considered to have been abandoned by the plaintiff, the sheriff will be released from any obligation to keep the property, and the defendant may demand his restoration. To enable the plaintiff to sell the property, an alias *feri facias* must be issued, a new seizure be made, and new notice be given. *Id.*

23. A sheriff cannot be made liable for failing to return a *capias ad satisfaciendum*, where the writ was abolished before the return day. *Frey and another v. Hebenstreit and another*, 1 R. R. 561.

24. No privilege or lien is created on the fees of office due to a sheriff, by his official defalcations. The debts due to him, in whatever amount, form together with his other property, a common

fund, out of which all his creditors are to be paid. *Bank of Alabama v. Hozey*, 2 R. R. 150.

25. Plaintiff having obtained a writ of provisional seizure caused it to be levied on a debt due to defendant by a third person, which the sheriff, without any order of Court, released, on the execution of a bond by the defendant, with security, for the restoration of the property, and satisfaction of any judgment which the plaintiff might obtain. The bond was assigned to the plaintiff, but no evidence offered to prove that he accepted the assignment. *Held*, that the release was illegal, and the sheriff responsible to the plaintiff for the amount of the seizure. *Fernandez v. McVittie*, 2 R. R. 239.

26. To obtain a judgment against a sheriff with damages for his failure to return an order of seizure and sale on or before the return day, as required by the act of 7th April, 1826, section 27, it must be shown that a writ of seizure and sale was actually placed in his hands, and that he failed to return it on the return day mentioned therein. A statement in the judgment appealed from, that a writ was issued, is not sufficient. Such statements are not evidence. *Destréhan v. Garcia*, 2 R. R. 291.

27. Where property has been seized under a *fi. fa.*, the sheriff may proceed to sell though the return day has passed, or the writ itself has been returned into Court; and payment to the sheriff under such circumstances, for the purpose of liberating the property seized, will discharge the debt. *Byrne v. Taylor*, 2 R. R. 341.

28. Where, subsequently to the execution of the official bond of a sheriff, a new office is created, by which his duties and emoluments are altered or diminished, his sureties will be discharged from any liability, either to the State or to third persons, for his future conduct. The contract cannot be changed without their consent; and no act was required to be done, on their part, to exempt them from future responsibility. *Roman v. Peters*, 2 R. R. 479.

29. Errors in the return of process should be amended so as to make the return conform to the truth; and the party entitled to demand such amendment, cannot be deprived of the right, by the expiration of the term of service of the sheriff or deputy sheriff who committed the error. Nor is it any objection that the amendment will affect rights acquired by third persons. *Elmore v. Bell*, 2 R. R. 484.

30. A sheriff may amend his return, even after a contest in which its validity is attacked. *Id.*

31. The sureties in a sheriff's bond, are not entitled to notice of the default of their principal. *Dougherty v. Peters*, 2 R. R. 534.

32. Whoever may be aggrieved by the official misconduct of a sheriff, has a direct action against each and every one of the sureties on his official bond, and is entitled to recover such an amount as will indemnify him, and no more; nor can such sureties be compelled to pay into Court, the amounts for which they may be ulti-

mately made liable. *Inhabitants of New Orleans v. Hozey*, 2 R. R. 552.

33. No particular form is prescribed by law for a warrant or execution, on behalf of the State, against a delinquent tax collector. A writ signed by the treasurer, commanding the proper officer, in the name of the State of Louisiana, is a sufficient compliance with the provision of section 6, art. 4 of the State Constitution, in regard to the style of process. *Scarborough v. Stevens*, 3 R. R. 147.

34. The second section of the act of 20th March, 1816, requires that the property of a delinquent sheriff, which has been seized under execution issued by the treasurer of the State, shall be sold for cash, and without appraisement. *Id.*

35. Where a sheriff has received a tax roll and undertaken its collection, he must show that he has used due diligence. He cannot throw upon the State the burden of proving that he actually received the amount. *Id.*

36. Defendant, a sheriff, having received the tax roll, and given security for its collection, enjoined an execution issued against him by the treasurer for the amount, on the ground that he had no legal authority to collect, no assessors having been appointed, nor assessment regularly made. There was no allegation or proof of any difficulty in making the collections in consequence of such pretended irregularity, nor any proof that defendant hesitated, on that account, to proceed with the collection. On a motion to dissolve the injunction: *held*, that such illegality not having been objected to by the tax payers, it is too late for the sheriff to interpose such an objection. *Id.*

37. The law having provided the mode by which a sheriff, who has undertaken to collect the taxes, can obtain a credit for the amounts due from non-residents or insolvents, he will not be allowed, by enjoining an execution issued against him by the treasurer, to retain such amounts. He must resort to the means pointed out by law, to establish the credit to which he is entitled. *Id.*

38. Under the 21st section of the act of 27th March, 1813, a sheriff who fails to pay over, according to law, the taxes collected by him, will not be entitled to commission for their collection. *Id.*

39. In a sale under execution, on a twelve months' credit, the sheriff is the agent of the party for whose benefit the sale is made, in taking bond from a purchaser. He is liable to the former, if he accept insufficient, and to the latter if he refuse sufficient surety; and is, therefore, the proper judge of its sufficiency. *Wells v. Moore*, 3 R. R. 156.

40. The sureties on a bond given by a sheriff for the collection of the parish taxes, cannot, when sued as sureties for a portion of the taxes collected but not paid over by the sheriff, contest the legality of the ordinances of the police jury making the assessment. By receiving the tax roll, and executing the bond, the sheriff and his sureties recognized the authority of the police jury. It is too late to

contest the validity of their ordinances, after having acted under them, and collected the taxes. *McGuire v. Bry*, 3 R. R. 196.

41. Separate bonds may be taken from a sheriff for the collection of the State and parish taxes, though one bond would be sufficient. *Id.*

42. Bond in the sum of \$8,935, for the collection of the parish taxes, agreeably to the assessment roll, the taxes for ordinary parochial purposes amounted to \$3,573 66, and there was a special tax, of an equal amount, collected for a particular purpose. In an action on the bond: *held*, that the sureties were bound for both, it being improbable that a bond would be executed for \$8,935 to secure the payment of \$3,573 66 only. *Id.*

43. Under the act of 28th February, 1837, actions against the sureties of a sheriff on his official bond, are prescribed by the lapse of two years. *Mulhollan v. Henderson*, 3 R. R. 297.

44. A sheriff has a right to retain possession of property sold by him during the pendency of a rule to show cause why the sale should not be set aside. *Bayon v. Breedlove*, 3 R. R. 383.

SHERIFF'S BONDS.

1. It is not certain that an ex-sheriff could recover on a bond taken payable to himself as sheriff, after he is *functus officio*. *Buisson v. Hyde et al.* 17 L. R. 19.

2. A sheriff's bond, taken under an order of Court, payable to himself as sheriff, for the price of property sold, gives him no right to the bond in his former capacity of sheriff, when he has resigned, as the legal agent of the party interested, and less so in his individual capacity. *Buisson v. Hyde et al.*, on a re-hearing, 17 L. R. 22.

3. So, a sheriff having ceased to be a public officer, has no longer any right to keep, or collect any bond given to him as sheriff, in execution of any order of Court. *Id.*

4. Where a bond is taken to the sheriff in his official capacity, although it be not payable to his successors in office, yet on his resignation, his successor ought to be the judicial depository of the bond. *Id.*

SHERIFF'S SALE.

1. The sheriff is not bound to give any notice, previous to seizure under a writ of *fiери facias*. Notice given on the day of seizure is sufficient; and three days afterwards, the sheriff may advertise the property for sale. *Tompkins v. Stroud et al.*, 16 L. R. 274.

2. After the lapse of more than twenty years, a sheriff's sale will be presumed good and valid. *Brosnaham et al. v. Turner*, 16 L. R. 433.

3. Where a judgment, writ of execution, and sheriff's sale are shown in support of a title, it necessarily creates a strong presumption in favor of the title; and is *primâ facie* evidence that the formalities of law have been complied with. *Same v. Same*, 16 L. R. 442.

4. The sheriff may proceed to make further seizures under the same writ of *feri facias*, if, by the sale of the property first seized, it is insufficient to satisfy the writ. *Fink v. Lallande et al.*, 16 L. R. 547.

5. A sheriff's return is *primâ facie* evidence of the legality of his acts; and it becomes the duty of the party attacking the validity of a sheriff's sale, to prove that the formalities required by law were not complied with. *Id.*

6. If a levy be made within or before the return day of the execution, the sheriff may proceed to sell afterwards, even after the return day of the writ. *Id.*

7. The appraisement is immaterial in a sheriff's sale on twelve month's credit, when the property must be sold for whatever it will bring. *Id.*

8. After a lapse of twenty years, the legal presumption is in favor of the sheriff's acts, and of the legality and validity of the sheriff's sale. *Id.*

9. The judgment under which a sheriff's sale was made, must be produced as the basis on which execution issued, and which is of itself *primâ facie* evidence of the regularity of the previous proceedings. *Childress v. Allin et al.*, 17 L. R. 37.

10. So, a sheriff's deed which appears on its face to have been officially and legally made, should not be rejected when offered as evidence, in support of the plaintiff's title, on the ground that the judgment on which execution issued, was defective and not legally rendered. *Id.*

11. The writ of execution and sheriff's return thereon, in ordinary cases are absolutely necessary to support a sheriff's sale; but when it is shown that they, together with the other papers of the suit, have been lost or destroyed, a copy of the naked judgment from the minutes of the Court will suffice. *Id.*

12. Where the judgment creditor purchases in the property of his debtor at sheriff's sale, and reconveys it to him on certain terms and conditions; from the moment of the adjudication it is an extinguishment of the judgment for the price bid on the property; and no new execution can issue on the judgment without notice, and contradictorily with the judgment creditor. *Zacharie v. Winter*, 17 L. R. 76.

13. A subsequent mortgagee of property sold at sheriff's sale, who made a private arrangement with the purchaser, who was the

seizing creditor, was an incompetent appraiser. A fraudulent appraisal is, as if none had been made. *Zacharie v. Winter*, 17 L. R. 76.

14. A sheriff's sale of immoveable property must be made at the seat of justice for the parish where the seizure is made; unless in the country and the debtor requires it to be made on the plantation, which fact must be stated in the advertisement. *Id.*

SHIPPING.

1. As a general rule the masters of steamers are authorised to purchase necessary supplies for the use of their boats, and to bind the owners to pay for them; but they have no authority to purchase supplies or merchandize for third persons, or to bind the owners therefor. *Calef and another v. Steamer Bonaparte and owners*, 1 R. R. 463.

2. Attachment by plaintiff of goods belonging to defendant, in the hands of third persons, who were made garnishees. The latter delivered up the goods, except a part retained to secure an amount due to them as agents of a ship, for freight of the whole lot. A rule having been obtained by the plaintiffs on the garnishees, to show cause why they should not deliver up the goods retained, the latter suffered it to be made absolute, without objection, and on execution, surrendered the balance of the goods to the sheriff. On a subsequent rule by the owners of the ship, against the plaintiffs, defendant, and sheriff, to show cause why the freight of the whole lot of goods, should not be paid by preference out of the balance last surrendered by the garnishees. *Held*, that the defendant, though without interest in the question of privilege, as between the plaintiffs and the owners of the ship, is interested in defeating the claim of the latter, and may plead prescription against it; that no prescription could run so long as any of the property remained in the hands of the agents of the ship owners, as a pledge for the payment of the freight, such pledge being a standing acknowledgment of the debt; and that it commenced running only from the delivery of the goods to the sheriff, from which time the owners of the ship had fifteen days to assert their privilege for the freight, and one year to urge their claim against the debtor. *Wilson v. Bannen*, 1 R. R. 556.

3. A ship owner may retain all the goods shipped, until the all freight bill is paid. Every part of the goods is liable for the whole debt. Where a part only of the goods shipped have been retained as security, it will be liable for the whole freight. *Id.*

4. Ships and other vessels are not susceptible of being mortgaged, except according to the laws and usages of commerce. The validity of an hypothecation of them will not be recognized in any other cases; and there is no distinction in this respect between vessels

trading with foreign ports, and those which do not leave the State. *Hill v. Phoenix Towboat Company*, 2 R. R. 35. *Hill v. De Lizardi*, 2 R. R. 89.

5. Advances made to the owner, and applied to the use of a vessel, confer no privilege on the creditor. Such a claim is not embraced in any of the classes provided for by article 3204 of the Civil Code, enumerating the debts privileged against ships or other vessels. The creditor is not subrogated to the rights of those whose privileged claims may have been paid out of the money advanced by him. *Hill v. Phoenix Towboat Company*, 2 R. R. 35.

6. The object of an hypothecation bond is to procure the necessary supplies for vessels in distress in foreign port, where the master and owners are without credit, and in cases in which, if assistance could not be procured by such means, the vessel and cargo might perish. *Id.*

7. The masters and owners of a vessel are not responsible for damage to the cargo occasioned by the peril of the sea, where no proof is adduced of want of care in stowing. *Lemaitre v. Merle*, 2 R. R. 402.

8. As a general rule, where goods are acknowledged to have been received in good order, and are delivered in bad, the carrier will be responsible; but he may show that the damage arose from causes which existed before the bailment, or from the defects of the thing itself. *McIntosh v. Gastenhofer*, 2 R. R. 403.

9. Parole evidence is admissible to prove an agreement to sell a vessel, anterior to the date of the written act of sale. *Bell v. Western Marine and Fire Insurance Co.*, 3 R. R. 428. *Bell v. Firemen's Insurance Co. of New-Orleans*, 3 R. R. 423.

10. One who has agreed to sell a vessel, but has neither delivered it nor received the price, has an insurable interest, the vessel being still at his risk. *Bell v. the Firemen's Insurance Co. of New-Orleans*, 3 R. R. 423.

SIMULATION.

1. A simulation is not necessarily a fraud. It is only when injury to third persons is intended that it becomes fraudulent. *Gravier's curator v. Carraby's executor*, 17 L. R. 118.

SLANDER.

1. In actions of slander, when the words spoken, are uttered with the intent to defame and injure the plaintiff in his business and livelihood, the law authorizes a recovery in damages for the injury sustained, without showing special damages. *Guice v. Harvey*, 14 L. R. 198.

2. The jury have no fixed rule in assessing damages in cases

where the words are actionable. They may take into consideration the trouble and inconvenience which the plaintiff has been at in seeking relief, as making part of the injury sustained. *Guice v. Harvey*, 14 L. R. 198.

3. The Louisiana Code, art. 2294, which declares, every act of man, which causes damages to another, obliges him by whose fault it happens, to repair it, *does not limit the right to recover*, in an action of slander, to words *actionable per se*, or require proof of special damage when not actionable, according to the common law rule. *Miller v. Holstein*, 16 L. R. 389.

4. So, where the plaintiff was charged with having sworn falsely, and proved that he always supported a good character, upon which there was a verdict of five hundred dollars: *held*, that such a charge is in itself presumption of damages, and the law has left the question of damages to the jury, subject to the revision of the Court. *Id.*

5. The Courts in Louisiana are not bound by the technical and artificial rules of the common law of slander, but where our law is silent, we may resort to a foreign system for a rule, consonant to reason and equity. *Miller v. Holstein*, 16 L. R. 395.

6. But the Court is not prepared to adopt the common law distinction, between words actionable in themselves and words which are not so; and to say a plaintiff is not entitled to recover in an action of slander, unless charged with an indictable offence, without proof of special damages. *Id.*

7. Garland J. Actions of slander may be maintained without proving damages, and the party may recover. *Id.*

8. Every act of man, which causes damage to another, creates responsibility; and when that responsibility is not defined, we must proceed under art. 21 of the Louisiana Code, and resort to natural law, reason and usage. *Id.*

8. Martin J. dissenting. In actions of slander, there are words which are actionable in themselves, and damages will be given, although none are proved; but there are others not actionable, and no damages will be given, unless some are proved. *Id.*

10. The judgment should be reversed, and the case remanded, with directions to the judge not to instruct the jury, that charging the plaintiff falsely and maliciously with moral turpitude, so as to injure his character and standing in society they should find damages for him, without any special damage being proved. *Id.*

11. To recover in an action of slander, malice in defendant must be proved. *Boullemer v. Philips*, 2 R. R. 365.

SLANDER OF TITLE.

1. Plaintiff having offered, through a broker, to sell a piece of

property for a fixed price, placed a written memorandum in the hands of the latter, specifying the conditions. A list of persons willing to purchase on the terms proposed, with the proportion which each would take, and the names of their respective endorsers, was subsequently approved and signed by the plaintiff. These memoranda having been placed in the hands of a notary to prepare an act of sale, the completion of the sale was arrested in consequence of a difficulty raised by the defendants as to the validity of plaintiff's title. *Held*, that the facts prove a contract binding on the parties; and that the assertion of title to the premises by the defendants, under such circumstances, and with such evidence of right, could not subject them to damages for slander of plaintiff's title. *Walden v. Peters*, 2 R. R. 331.

2. In an action for slander of title, plaintiff must prove malice in the defendant. But where it appears that the latter had no color of title at the time, malice may, perhaps, be inferred. *Id.*

3. No action for slander of title can be maintained, where defendant has good reason to believe that he was the real owner of the property. *Id.*

4. The principal object of a suit for slander of title is to compel the defendant either to waive all right, or to institute suit and thereby enable the plaintiff to establish his title. *Id.*

5. In an action for slander of title, defendants, who had reconvened by asserting title under a contract with plaintiff, and prayed that he might be condemned to execute a conveyance to them or to give security, as well as for damages, on the second day of the trial, but before plaintiff had concluded his evidence, moved to discontinue. *Held*, that they were entitled to discontinue the whole plea in reconvention, including the claim of title. *Id.*

SLAVE.

1. Suit to recover from defendants the value of a slave, killed by the engine while asleep on the road; *held*, that where the accident may be attributed to the neglect or fault of both parties the plaintiff cannot recover. *Fleytas v. Pontchartrain Rail Road Co.*, 18 L. R. 339.

2. The plaintiff must allege and prove that the act of the master of a vessel in taking on board his slave and employing him as a cook, caused him an injury which the owners could have prevented but did not, in order to render them liable. *Duncan v. Hawks et al.*, 18 L. R. 548.

3. The statute of 1835, making the owners of vessels and steamboats liable for the value of slaves, carried out of, or from one part of the State to an other, without the consent of the owners, does not apply to a case, where the master merely employs the slave as a cook on board of his vessel in port for a few days. *Id.*

SLAVES.

1. Where certain slaves in the hands of third persons, claim to be set free under the provisions of the will of their former master; his executor must be made a party. They have a right to stand in judgment for the purpose of compelling the executor to emancipate them in pursuance of the provisions of the will, but this must be done contradictorily with him. *Bob & Milly et al. v. Nugent's syndic*, 15 L. R. 63.

2. When a slave was hired as a ostler, in a small town, and employed to drive a wagon and haul wood to the tavern and was accidentally killed: *held*, that the owner cannot recover his value, as having been improperly used or employed. *Taylor v. Andrus*, 16 L. R. 15.

3. A slave taken to the State of Illinois, the Constitution of which forbids slavery and involuntary servitude; and resides there for some time, with the express or implied consent and knowledge of her master, in his family, she is under no obligation to serve him any longer, but became absolutely free, and being once free, could not again be made a slave, by removing her to a slave State. *Elizabeth Thomas, f. w. c. v. Generis et al.*, 16 L. R. 483.

4. Where the evidence shows that a slave, mules, and cart were run over and destroyed through the fault and folly of the slave in driving across the rail-road of the defendants, when the engine was approaching and near, the owner cannot recover any thing for their loss. *Lesseps v. Pontchartrain Rail-Road Company*, 17 L. R. 361.

5. A slave held by a deed of trust or mortgage, which is not recorded in this State, to which the slave has been removed, is liable to seizure by a creditor of the original owner. *Zollikoffer v. Briggs, Lacoste & Co.*, 19 L. R. 521.

6. Slaves held under a sale, with the equity of redemption existing, are not liable to the seizure of a creditor of the original owner, he can seize only the equity of redemption. *Id.*

SLAVES AND FREED PERSONS.

1. It is the duty of masters of steam-boats, as soon as a slave is discovered on board without permission, to cause him to be landed or secured. *Goldenbow v. Wright*, 13 L. R. 371.

2. So, where a slave was discovered on board without permission, soon after the defendant's boat started from the port of New-Orleans, and was allowed to be employed by the cook, without any measures being taken for securing him, and was lost on the trip or voyage, the master was held liable to the owner for his value. *Id.*

3. Where a slave was taken from Louisiana, with the consent of

the owner, to France, although afterwards sent back here, she was thereby entitled to her freedom, from the fact of having been taken to a country where slavery is not tolerated, and where the slave becomes free by landing on the French soil. *Priscilla Smith, f. w. c. v. Smith*, 13 L. R. 441.

4. When owners go out of the State with their slaves, and afterwards emancipate them, they must do so according to the laws of the place where the emancipation takes place. *Id.*

SOVEREIGNTY.

1. On the transfer of the sovereignty of the country, the inhabitants are protected in the possession of their private property, such is the law of nations, even in cases of conquest. *Kenton v. the baroness of Pontalba*, 1 R. R. 343.

SPAIN, LAW OF.

1. The laws of Spain were not abrogated by the transfer of the territory of Orleans to the United States, but the commercial law of the latter became, by that transfer, the law of the territory of Orleans. *Wagner v. Kenner*, 2 R. R. 120.

STEAM-BOATS AND OWNERS.

1. The captain of a steam-boat is answerable for the damage occasioned by the engineer in bringing a slave on board, or acts of those employed by him, even when these acts are done contrary to his instructions and without his knowledge. *Buel v. New-York Steamer et al.*, 17 L. R. 541.

2. To make the captain of a steam-boat liable for a slave lost by going on board, the plaintiff must in all cases prove he could have prevented the act complained of, but did not. *Id.*

3. Where it is shown a slave was allowed to go on board defendant's steam-boat and be carried out of the State, so that he was lost, he is liable for his value and all costs and damages, and cannot be excused on the pretext that the slave passed for free. *Id.*

STOPPAGE IN TRANSITU.

1. The vendor has the right to stop the goods *in transitu* and before they reach their destination, or are delivered to his vendee,

on the latter becoming insolvent. This right is paramount to any lien of a third party against the purchaser. *Hepp v. Glover et al.*, 15 L. R. 461.

2. So, where goods, on their passage, are delivered to a consignee to be forwarded to the vendee, the vendor may claim the right of stoppage *in transitu*, while they are still in the hands of the agent or consignee. *Id.*

3. If goods are delivered into the possession of an agent or consignee, for the purpose of conveyance *to the vendee*, it is not such a constructive delivery, as will deprive the vendor or creditor, of his right of stoppage *in transitu*. *Id.*

SUBSTITUTION.

1. There is nothing in the laws of this State to prevent property from being held in trust for the use of another, where all parties interested assent; and such a naked trust, to be executed within a reasonable period, does not amount to a substitution. *Malone v. Barker*, 2 R. R. 369.

SUCCESSION.

1. The succession of a *non-resident*, dying in the State, is opened in the Parish where he owned real estate, or in *that* in which his principal effects are situated, if he had effects in several Parishes; or in the Parish where he died, if he had no immoveable property in the State. *Oakey et al. v. Ducker*, 13 L. R. 375.

2. All claims for money, must be brought in the Court of Probates, for the Parish in which the succession is opened, whether the deceased had his residence in the State or out of it. *Id.*

3. Until a succession, accepted with the benefit of inventory, has been administered, it is under the control and supervision of the Court of Probates; and is not liable to be sold at the instance and recommendation of a family meeting in favor of the minor heirs. *State v. Judge of Probates of St. John Baptiste*, 17 L. R. 500.

4. After its liquidation, should there remain any property when the debts are paid, the beneficiary heirs may be put in possession. Any sale that may be necessary must be ordered by the judge of the Parish of the minor's domicil, with the advice of a family meeting. *Id.*

SUCCESSIONS.

1. Where a claim against an estate is unliquidated, or the curator objects and refuses to approve it, the party may sue on it in the

Court of Probates; but he cannot have execution immediately, as it must be paid concurrently with other creditors. *Anderson's administrator v. Birdsall's administratrix*, 19 L. R. 441.

2. Claims against estates in the course of administration, bear legal interest from the time they are due and payable, although unliquidated. *Id.*

3. Where a party having two capacities, takes possession of property of a succession, and it is doubtful in which capacity he holds, the legal presumption is that he takes in the capacity the law authorizes, and that he will do what it is his duty to do. *Selby v. Bass et al.*, 19 L. R. 499.

4. So, where the widow causes an inventory to be made of her deceased husband's estate, and omits to put some articles in it; renounces the community, but acts as administratrix and as tutrix of her minor children; and then as executrix under a will found, and pays some debts without the order of the judge, she is not liable as intermeddler, when there is no attempt at concealment or fraud shown. *Id.*

5. Before the promulgation of the present Civil Code, brothers and sisters of the whole blood excluded those of the half blood from the inheritance. *Price and others v. Grubbs and others*, 1 R. R. 91.

6. A Court of Probate of another Parish than that in which a succession is opened, cannot order the payment of a debt due by the succession, even where such debt is pleaded in reconvention to an action by the administrator. The Court of Probates of the Parish in which it was opened, is alone competent to order the payment of the debts. *Stanbrough, administrator v. Garrett, administrator*, 1 R. R. 13.

7. Courts of ordinary jurisdiction, before which an action of revendication is brought, must of necessity pronounce on the validity of a will, under which the property sued for is held, either when the plaintiff attacks it, or the defendant sets it up as his title. *Rachal, tutor, and another v. Rachal and husband*, 1 R. R. 115.

8. The proceedings in a Court of Probate for the settlement of an estate, such as the probate of a will, and the other for its execution, cannot be considered as a judgment binding on third persons not parties thereto. *Id.*

9. A decree of the Court of Probates admitting certain persons as heirs, is *prima facie* evidence of their being so, though such a recognition will not preclude other heirs, or even debtors of the estate, from showing the contrary; but until this is done, the decree of the Court of Probates must be held sufficient evidence of heirship. *Glover and others v. Doty*, 1 R. R. 130.

10. In an action for the partition of the property of a succession, no claim can be allowed by the appellate Court, which was not made before the Court of Probates, nor decided by that tribunal. *Griffin, tutor v. Waters*, 1 R. R. 149.

11. Where the community has been dissolved by the death of the husband or wife, the survivor, with the heirs of the community, become co-proprietors of the estate; and where the surviving partner retains possession he becomes the *negotiorum gestor* of the heirs. *Griffin tutor v. Waters*, 1 R. R. 149.

12. An action for a final settlement of the partnership affairs, against a surviving partner and the curator of the estate of a deceased partner, in which the petition sets forth acts of mismanagement and fraud, is not a claim for a sum of money in the meaning of art. 924 of the Code of Practice, and as such exclusively within the jurisdiction of the Court of Probates. Such an action is properly brought before a Court of ordinary jurisdiction. In which a jury, if called for, may pronounce on the question of fraud. *Gal-lier v. Walsh and another*, 1 R. R. 226.

13. A surviving partner will not, by consenting to the appointment of experts by a Court of Probates to examine the partnership books after the death of his co-partner, so subject himself to its authority as to preclude his right to except to its jurisdiction. *Id.*

14. Where one of two obligors on a joint note who must be sued together, has died, the action must be brought before a Court of ordinary jurisdiction. *Id.*

15. Where the bond given by an executor, on an appeal from a judgment rendered against him by a Court of Probate on the opposition of the heirs, purports to be executed in favor of the heirs only, but was intended in reality for the benefit of all entitled to receive any part of the assets in his hands, and whose right to enforce payment was suspended by the appeal, it will enure to the benefit of all. *Succession of Roboam*, 1 R. R. 258.

16. A will may be presented for probate by any one having the custody of it, or interested therein. *Succession of Lytle*, 1 R. R. 268.

17. A Court of Probates may order the sequestration of papers belonging to a succession, administered under its authority, when unlawfully retained by a third person. *Cordes, curator v. Clarke*, 1 R. R. 271.

18. The demand required to be made of an administrator, curator, or testamentary executor, before commencing suit against a succession, is in the nature of an amicable demand, and need not be proved, unless specially denied. *Police Jury of St. Helena v. Fluker, administrator*, 1 R. R. 389.

19. Where by an agreement among the heirs, the community property is adjudicated to the widow on the condition of her paying the portions due to each of the heirs, such adjudication amounts to a sale, and vests the estate in her. *Winchester v. Cain and another*, 1 R. R. 421.

20. Any irregularity in the adjudication to the widow of the interest of a minor heir in the property of a community, can only be taken advantage of by such heir, or by those claiming under him. *Id.*

21. An appeal will lie from the judgment of a Court of Probates ordering the partition of the property of a succession, where the judgment does not direct in what manner the partition is to be made, nor appoints any notary to make it. Such a judgment may be appealed from as a final one, because no further proceedings can take place under it. *McCollum and husband v. Palmer and others*, 1 R. R. 512.

22. The judge of the Court of Probates in ordering the partition of the property of a succession, is expressly required by art. 1027 of the Code of Practice, and art. 1267 of the Civil Code, to direct the manner in which it shall be made, and to appoint a notary to make it. *Id.*

23. Where a partnership has been dissolved by the death of one of the members, an action may be maintained by the survivors, and the legal representatives of the deceased. *McCord and others v. West Feliciana Rail Road Co.*, 1 R. R. 519.

24. In an action of the survivors, and the curator of the succession of a deceased partner, the death of the curator *pendente lite*, is no cause for dismissing the suit. The action may be prosecuted by the heirs, or other legal representatives of the deceased partner. *Id.*

25. Where the beneficiary heir is not of age, or resides out of the State, another person than his attorney in fact or that of his guardian may be appointed administrator; but the circumstance of the applicant's being such attorney, should not repel him, especially where there is no opposition. *Succession of Manson*, 1 R. R. 235.

26. The validity of a decree appointing a dative testamentary executor, cannot be inquired into collaterally. *Succession of Robo-aum*, 1 R. R. 258.

27. Where the term has expired for which an executrix was appointed under a will admitted to probate in another State, and no evidence is offered of her re-appointment, she cannot be recognized as executrix by a Court of Probates in this State. *Succession of Sommerville*, 1 R. R. 261.

28. One named as executor in a will admitted to probate in another State, and ordered to be registered and executed here, cannot, where no proof is offered of his having been qualified or recognized as executor, administer under it without further authority. *Succession of Laytle*, 1 R. R. 268.

29. One who has no interest in a succession, nor in the question of who shall be appointed to administer it, cannot complain of the want of any of the formalities required by law to precede the appointment of a dative executor. *Succession of De Armas*, 1 R. R. 461.

30. One who opposes the appointment of a curator of a succession, must allege a better right in himself. *Id.*

31. An applicant for the curatorship of a succession, is not bound to state in his petition to the Court of Probates, the grounds on which he claims the appointment, as the first applicant is entitled

ed to the curatorship, unless legally opposed. In case of opposition, he may show, in a supplemental petition, the grounds of his claim. *Succession of Pollet*, 1 R. R. 559.

32. An endorsement by the clerk of the Court of Probates on the petition of an administrator for the homologation of a tableau of distribution, that it was advertised on a certain day, is not sufficient proof of the publication of the advertisements required by law. *Taylor's administrators, and another v. Jeffries, administrators*, 1 R. R. 1.

33. Where the will does not give the seizin of the property to the executor, and he is not shown to have had possession of that which is sued for, he will not be responsible, unless he has neglected to take possession of the estate when entitled to do so; and in the last case, the heirs have only the right of demanding an account of his executorship, and the delivery of any property in his possession, or any balance due; and their account can only be demanded in the Court of Probates. *Grubb and others v. Henderson*, 1 R. R. 4.

34. A judgment in a suit against an administrator, ordering a claim against the succession to be paid with privilege, though the question of privilege may have to be settled afterwards, contradictorily with the rest of the creditors, is final as to the administrator, and may be appealed from by him. *Whatley v. Austin, administrator*, 1 R. R. 21.

35. It will be no defence to an action by the payee of a note, that it was taken by him for a debt due to an estate of which he had been administrator, and had, on a settlement of his accounts in the Court of Probates, and a subsequent partition among the heirs, been assigned to one of them, where there is no evidence that the plaintiff seeks to avail himself of the suit to the injury of the latter. The transfer being a matter of record, the defendant will be discharged by payment to the heir. *Duval v. Kellam*, 1 R. R. 58.

36. An administrator will be entitled to the full commission of two and a half per cent on the amount of notes taken by him for property sold at the probate sale of the succession. The commission is allowed not only for the actual trouble he may have had, but for the responsibility incurred. By selling the property, attending to the execution of the instruments of sale, and obtaining solvent endorsers on the notes received, he may well be considered as having, so far, fully administered on it. *Smith, administrator v. Cheney, administratrix*, 1 R. R. 98.

37. Where all the property of an estate has been retained in kind, and, after a few months' administration, delivered over to the heirs, the administrator will be entitled to a commission of two and a half per cent on the whole amount of the inventory. *Id.*

38. The fees of counsel employed by an administrator on rendering the account of his administration, are a part of the expenses incurred, and form a correct charge against the estate; and when

the account has been rendered by the administratrix of a deceased administrator, she will be entitled to claim the allowance of such fees for counsel employed by her to render the same. *Smith administrator v. Cheney, administratrix* 1 R. R. 98.

39. Where the plaintiff sues as administratrix, and her capacity is denied, she must prove it, or be non-suited. *Segrest administratrix v. Hood*, 1 R. R. 108.

40. It is the duty of an executor, when rendering his accounts, to disclose the name of the heir to the succession, and to require that he be cited through his tutor or under-tutor. *Bry, under-tutor v. Dowell executor*, 1 R. R. 111.

41. On an opposition by the under-tutor of a minor heir to the homologation of the account of an executor, who was also tutor to the minor, the latter cannot object to proof of his tutorship, when offered by the opponent, on the ground that such tutorship was not alleged in the opposition. So soon as his right to oppose the account was contested, the under-tutor was bound to show that there existed such an opposition of interest between the minor and his tutor, as made it his duty to appear on behalf of the former; and this could not be done without showing that the executor was himself the tutor of the minor, to whom he was rendering an account. *Id.*

42. Where an under-tutor, in behalf of a minor, opposes the homologation of the accounts of an executor, it will be presumed that the estate has been accepted according to law, otherwise the minor would be without any interest in the matter. *Id.*

43. An executor is entitled to his discharge at the expiration of one year; his accounts cannot remain open, and his responsibility be continued for a number of years; and when they have been once settled by the Court of Probates, contradictorily with the heirs of age, or minors represented by their tutors or under-tutors, the decree will be as final and binding on such heirs as any judgment in an ordinary suit, to which they may have been parties. *Id.*

44. Where an executor is also tutor to the minor heir, his accountability to him as executor, should be finally determined before he enters upon his administration as tutor, which is to last until the majority of his ward, *Id.*

45. As a general principle, an administrator cannot create any liability binding on the estate, though he may, on receiving payment discharge a debt due to it, and if he discount a note received in payment on the sale of property belonging to the estate, his endorsee will have a claim against him personally, and cannot be compelled to wait for payment in the ordinary course of administration. *Hestres v. Petrovic*, 1 R. R. 119.

46. By applying for the administration of an estate, in a Parish different from that of his domicile, a party subjects himself to the authority of the Courts, within whose territorial jurisdiction the administration is granted, in every thing that concerns such administration. *Gallier v. Walsh and another*, 1 R. R. 226.

47. A non-resident executor is bound, like other executors, to administer the estate under the authority of the Court of Probates, to have an inventory made, and in all other respects to proceed according to law. The will under which he acts need not be again admitted to probate, having been once proved; the executor need not take a new oath, having been previously sworn; nor need he take out new letters testamentary; but new security will be exacted of him, under the act of 13th March, 1837, where creditors present themselves and require it. *Succession of Wedderburn*, 1 R. R. 263. *Succession of Lytle*, 1 R. R. 268. *Succession Lally*, 1 R. R. 269. *Succession of Farmer*, 1 R. R. 270. *Succession of Hinde*, 1 R. R. 271.

48. The commission allowed to an executor, is for his trouble and care of the estate. Where, besides taking such care and trouble, he is obliged to disburse money in attending to its affairs, he is entitled to be reimbursed out of the estate. *Succession of Milne*, 1 R. R. 400.

49. The commission of two and a half per cent on the whole amount of the inventory, subject to a deduction for what is not productive, or due by insolvent debtors, allowed to an executor by art. 1676 of the Civil Code, is for the administration of the whole estate; where a part only has been administered, he is only entitled to a commission on such part. Where the estate has been administered by successive executors, each is entitled to the commission on so much as was administered by him. *Id.*

50. An action against the estate of a deceased administrator, to recover a balance due to the estate which he administered, must be brought in the probate Court under whose authority the estate of such administrator is being settled, and not in the Court of Probates of the Parish in which the first succession was opened; the former Court alone being empowered to ascertain and order, contradictorily with the other creditors of the estate of such administrator, the payment of any claims against it. A judgment of the latter Court, would not conclude the estate of such administrator, nor his other creditors; nor could any balance it might find to be due by his estate, be paid without an order of the former Court. During his life, the administrator was amenable to the latter, and might have been compelled to render an account of his administration; but after his death, any balance, due by him to the estate he administered, became a debt due from his estate, and its payment could only be ordered by the probate Court in which his succession was opened. *Thomas, administrator v. Bourgeat, executor*, 1 R. R. 403.

51. An attorney's fee, for services in making out the accounts, and attending to the defence of a suit against the succession of a deceased administrator, instituted before the Court in which such succession was opened, for a balance due to the estate which he administered, cannot be charged to the latter estate. It is only

where an account is regularly rendered by the representative of an estate, in the Court under whose authority it is administered, that the expense attending it, is chargeable on the estate. *Thomas, administrator v. Bourgeat, executor*, 1 R. R. 403.

52. The payment of interest at ten per cent a year under the act of 13th of March 1837, requiring executors, administrators, etc., to render full accounts of their administration at least once in every twelve months, under the penalty of dismissal from office, and of paying interest at that rate on all sums for which they may be responsible, from the expiration of the twelve months, is a part of the penalty, and necessarily coupled with the removal from office, and one cannot be imposed without the other. The penalty prescribed by this act, can only be inflicted in cases expressly provided for. *Id.*

53. The tutrix of the minors heirs, cannot administer a succession by virtue of her office as tutrix; she must be appointed administratrix, and give the security required by law. Payment to her of a debt due to the succession, would not protect the party making it, against the claim of the heirs of age, nor of the administrator, should one be afterwards appointed. *Tildon v. Dees, tutrix*, 1 R. R. 407.

54. The functions of an attorney appointed by a Court of Probates to represent the absent heirs of a succession, cease whenever the heirs present themselves, or send their powers of attorney to claim their respective portions of the estate. *Succession of Morgan*, 1 R. R. 514.

55. Where the accounts of an executor have been homologated, he can no longer be held responsible for payments made by him under the orders of the Court of Probates. Should the heir discover that payments have been made which were not due, his recourse, if he have any, is by an action *condictio indebiti*, against the party who has received what he was not entitled to; and where such payments have been made to the executor for commissions alleged to have been illegally allowed, an action to recover them may be brought against him individually, before a Court of ordinary jurisdiction. The defendant is no longer executor, nor is he sued as such. *Baldwin v. Carleton*, 2 R. R. 54.

56. An action may be maintained against an executor for a debt due by the succession, after a judgment recognizing the heirs and ordering them to be put in possession of the estate and homologating an account rendered by him, when it is not shown that the judgment recognizing the heirs and ordering them to be put in possession was ever executed or that the executor ever delivered up the property belonging to the succession, where the account appears on its face not to have been a final one, and there is no proof that the executor prayed to be, or ever was, discharged. *Tait v. Lewis*, 2 R. R. 351.

57. A married woman, not separated in property, cannot accept the office of testamentary executrix, without the consent of her

husband (C. C. 1657); nor can she, after acceptance, appear in Court in the execution of the trust, without the authority and assistance of the latter. The cases provided for by the articles 125 of the Civil Code, and 106 of the Code of Practice, are the only exceptions to the general rule prescribed by art. 123 of the Civil Code, that a wife cannot appear in Court without the authorization of her husband. *Dussumier v. Coiron*, 2 R. R. 368.

58. Notice of an application for the appointment of a dative testamentary executor must be given in all cases, in the same manner as on an application for the appointment of an administrator. The publication of such notice has not been dispensed with by the act of 16th March 1842. *Succession of Henderson*, 2 R. R. 391.

59. The act of 16th March, 1842, relative to executors, administrators, and curators, explanatory of art. 924 of the Code of Practice was intended to have a future, not a retrospective operation. *Id.*

60. The penalty imposed by the act of 13th March, 1837, section 3, on curators, executors and administrators, for failing to comply with its provisions in regard to the depositing in Bank of money belonging to the estate administered, is for the benefit of the estate and not of any individual creditor. *Yard, &c. v. their creditors*, 2 R. R. 400.

61. Where the heirs are present the succession is not vacant and no curator can be appointed to it. *Succession of Cunningham*, 2 R. R. 443.

62. An executor is entitled to a commission of two and a half per cent on the whole amount of the inventory, after deducting bad debts and un-productive property. The price for which the property comprised in the inventory may sell, is not the standard by which his commissions are to be calculated. *Succession of De Armas*, 2 R. R. 445.

63. Where the rights of a party to a succession, consist only in a right to a portion of the proceeds of the sale of the property, either in money, or in notes given for the price, it will be considered purely moveable; and this, though the notes should be secured by mortgage on the real estate sold. C. C. 466, 467. *Bonneau v. Poydras*, 2 R. R. 1.

64. The provision of art. 463 of the Civil Code, making an action for the recovery of an entire succession, an immoveable, relates only to the action given to the heir to recover an entire succession in kind, such as it existed at the time it was opened. It does not apply to an universal legatee, or legatee under an universal title, limited to claiming the moveable part of a succession, or a portion of the residue thereof, and not entitled to take possession of the estate in kind, in the condition in which it was at the opening of the succession. *Id.*

65. By art. 2602 of the Civil Code, all the warranties to which private sales are subject, exist against the heirs in judicial sales of

the property of successions. *Aliter*, as to the creditors, on the sale of the property surrendered by an insolvent. The heirs are warrantors to the fullest extent, being owners and vendors, while the creditors are neither. The latter are only responsible, severally, for the restitution of the proceeds of the sale of the property received by them. *Rivas v. Hunstock*, 2 R. R. 187.

66. The purchaser, at a judicial sale of the property of a succession sold for a debt due by the ancestor, will, where the proceedings have been fairly conducted, acquire a title good against an heir who may subsequently make himself known. *Wherry v. Bell*, 1 R. R. 225.

67. An heir to whose benefit the payment, by a third person, of a debt due by the ancestor, has enured, will be bound to refund the amount. *Id.*

68. Heirs of full age may make an extra-judicial partition of the property coming to them. So the legatees may compound, or give a valid discharge. *Succession of Morgan*, 2 R. R. 354.

69. A testator, owing no debts, directed his property to be turned into cash, and bequeathed the *residuum*, after the payment of certain legacies, to a trustee, for the propagation of the christian religion. The heirs and legatees, being all of age, and the trustee, for the purpose of saving expense and to avoid a sale of the property at an unfavorable period, agreed to a division in kind, and the executors prayed that an account and partition, made in conformity to such agreement, should be homologated, and the decree taken as a final settlement and partition of the estate, to which no opposition was made. *Held*, that the heirs had a right to enter into such a compromise; that the trustee, being responsible only to the heirs for the manner of executing the will of the testator, was authorized, by their consent, to agree to the arrangement; and that the compromise, not being one reprobated or prohibited by law, should be carried into effect. *Id.*

70. A judgment ordering a certain sum belonging to a succession, in the hands of the executors, to be appropriated in a particular way, is not binding on a legatee not a party to the proceeding. *Succession of Milne*, 2 R. R. 382.

71. The bequest of a sum of money for a specified purpose, is a particular legacy. Such legacies are a charge upon the whole estate, and become the personal property of the heir, and must be discharged in preference to all others, as if debts of the estate, though they exhaust the whole succession, or all that remains after the payment of the debts, and the contribution for the legitimate portions where there are forced heirs. C. C. 1627, 1661. *Id.*

72. Universal legatees are bound, personally, not only for the debts and charges of the succession, but to discharge all the legacies, unless in case of reduction (C. C. 1603); and where they wish to take the seizin of the succession from the testamentary executor,

they must offer him a sum sufficient to pay the moveable legacies. C. C. 1664. *Succession of Milne* 2 R. R. 382.

73. In regard to the creditors of a succession, the administration of the assets and the payment of the debts of the deceased must be governed exclusively by the law of the country where the administrator or executor acts, and from which he derives his authority to collect the assets. No provision of the will could subject him to the necessity of seeking payment elsewhere. Otherwise, as to legatees, who have no claims against the succession but such as the testator pleased to give them, who might make his bounty conditional. They must take their legacies, if at all, *cum onere*. *Succession of Mary*, 2 R. R. 438.

74. Where the creditors of a succession are litigating their rights contradictorily with each other, and the value of the succession exceeds three hundred dollars, an appeal will lie to the Supreme Court, though the claim of each creditor may not amount to that sum. *Succession of Field*, 2 R. R. 5.

75. Art. 996 of the Code of Practice, which authorizes actions for debts due from a succession to be brought before the ordinary tribunals, where the heirs, though all or some of them be minors, are in possession of the estate, should, perhaps, be confined either to heirs absolute, or to beneficiary heirs in possession of a succession after it has been fully administered. But where a succession appears to have had but few debts, and to have been administered to a certain extent, and to have been in the possession of the widow and heirs of the deceased for several years, an action to recover a debt due by it, may be brought before the Courts of ordinary jurisdiction. *Porter v. Muggah*, 3 R. R. 29.

76. Courts of Probates have exclusive jurisdiction of claims for money against successions administered by curators, executors, etc.; and all suits for money, pending before the ordinary tribunals, against one who dies having a vacant succession, must be transferred to the Court of Probates of the place where his succession is opened. *Succession of Ludewig*, 3 R. R. 92.

77. The first section of the act of 25th March, 1831, which provides that whenever the Parish judge of any parish is disqualified by interest, or otherwise, to try any case in the Parish Court, that the District Court shall have jurisdiction thereof, and that the same shall be transferred by the Parish or Probate Court to the District Court, does not contemplate the transfer of all the mortuary proceedings and documents relative to any estate in which the judge of probates may be interested. The District Court may take cognizance of the appointment of a curator, where the probate judge is interested; but it is not necessary for this purpose, that the papers relative to the succession should be removed from their proper place of deposit. *Ex parte Borden*, 3 R. R. 399.

78. In an action, by the purchaser, at a sale under execution, of the undivided shares of certain heirs in a succession, against the

administrator, for paying over the amount to the heirs after notice, the defendant cannot set up any irregularity or nullity in the original proceeding against the heirs; the payment is at his peril, and he will be liable over to the purchaser. *Noble v. Nettles*, 3 R. R. 152.

79. The acknowledgment and payment by curators and executors, of debts due from the estates administered by them, are *prima facie* evidence of their correctness. When, from the extravagance of the charges, the unnecessary character of the supplies, or from any other circumstance, bad faith or dishonesty may be presumed, Courts cannot be too strict; but where there is every appearance of good faith and correct management, such fiduciaries should not be held, in the settlement of their accounts, to the strictest rules of evidence. Were they obliged to prove the signatures to every receipt, the cost of the attendance of witnesses and of their depositions, would involve the estates in heavy and unnecessary expense. *Succession of Frantum*, 3 R. R. 283.

80. Full commissions of two and a half per cent on the productive property, may be allowed to an administrator, though the whole estate has not been fully administered by him. *Id.*

81. Before delivering the whole estate into the hands of an universal heir, the executor has a right to require, that a sufficient sum be placed in his hands to pay the particular legacies. C. C. 1664. *Succession of Caraby*, 3 R. R. 349.

82. Heirs of age can accept a succession simply, or do acts rendering themselves unconditionally liable. Minors are necessarily beneficiary heirs. *Porter v. Muggah*, 3 R. R. 29.

83. The heirs should be informed of every act of an executor or creditor, which may charge or materially affect the property of a succession. *Succession of Bowles*, 3 R. R. 35.

84. Under art. 647 of the Code of Practice, the undivided shares of an heir in a succession, may be seized and sold under execution. *Noble v. Nettles*, 3 R. R. 152.

85. In an action, on an open account, against the heirs among whom a succession has been partitioned, for articles furnished to their ancestor, interest will be allowed from judicial demand, and not from the death of the ancestor. *Burney v. Brown*, 3 R. R. 270.

86. Illegitimate children, though duly acknowledged, have no claim against the estate of their natural father, but for alimony. C. C. 224, 257, 913. *Liautaud v. Baptiste*, 3 R. R. 441.

87. The rights acquired by children legitimated by the subsequent marriage of their parents, have no effect against gratuitous dispositions, previously made by the latter. The legitimation has no retroactive effect. It operates only from the date of the marriage. C. C. 219, 948, 1556. *Id.*

88. A sale by the administrator of a succession of property held by the deceased, subject to a mortgage, gives the mortgagee no claim against the succession. His rights cannot be affected by such

a sale ; and he must pursue the property in the hands of the subsequent third possessor. *Succession of Field*, 3 R. R. 5.

89. Notice must be given to the forced heirs, of any application to sell the property of a succession in which they are interested. It may be to their interest to prevent a sale, by furnishing the means necessary to extinguish the debts and legacies. *Succession of Bowles*, 3 R. R. 35.

90. An application by an executor for authority to sell a part of the effects of a succession, is in the nature of a rule to show cause ; and it is only necessary that reasonable notice thereof should be given to the parties interested. *Id.*

91. The testator had bequeathed all his estate to his mother and one of his sisters. An order for a sale of the property having been procured by the executor, a sister of the deceased, to whom no part of the estate had been left, obtained an injunction to prevent the sale, and the curator of the testator's mother, an interdicted person, intervened in the suit, alleging that the latter was a forced heir recognized by the will, that the injunction was for her benefit as well as the plaintiff's, claiming part of the damages sued for, and praying to be allowed, with the consent of the plaintiff, to unite with the latter, and to pay a part of the costs. Answer by defendant to the petition of intervention, denying the right of the curator to intervene ; and judgment dissolving the injunction, and ordering the executor to proceed with the sale. On an appeal by plaintiff and intervenor : *held*, that the plaintiff having no interest in the succession of the testator, had no right to interfere with its administration ; and that no judgment having been rendered for or against the intervenor in the lower Court, his appeal must be dismissed. *Field v. Mathison*, 3 R. R. 38.

92. The decree of the Court of Probates where the succession is opened, made in conformity to the advice of a family meeting, is necessary to authorize the sale of property belonging to minor heirs and where such a decree has been made, the Court will not look beyond it. *Beard v. Morancy*, 3 R. R. 119.

93. Where a stranger to a succession withholds the price of property purchased at a sale of its effects, an action for the amount can be brought only before a Court of ordinary jurisdiction. *Aliter*, where a legatee and universal heir seeks to avail himself of the privilege allowed by art. 1265 of the Civil Code, of retaining the price of property so adjudicated, until his share shall be fixed by a partition. The rights of a co-heir, who exercises this privilege, must be settled contradictorily with the other heirs, under the direction of the Court of Probates, whose decree must fix the portion coming to each. Until this be done, the heir who purchases keeps the purchase money as a kind of deposit, subject to the decision of the Court of Probates, which must determine what he is to pay over. The Court which makes such a decree, must have authority to enforce obedience to it. *Succession of Caraby*, 3 R. R. 349.

94. The provision of article 984 of the Code of Practice, requiring the holder of any claim for money against a succession to present it to the curator or executor before commencing an action, is like the amicable demand to be made of a debtor before suit. Its omission may prevent the recovery of costs, but not that of the debt itself. *Fisk v. Friend*, 3 R. R. 264.

SUMMARY PROCEEDINGS.

1. One who retains money, deposited in his hands as sheriff, after he has ceased to act as such, will continue subject to the summary process provided by law for the benefit of suitors where such officers are concerned. By retaining the money, which he might have deposited in Court, he keeps up his official relation with that tribunal. *Graham v. Swayne*, 1 R. R. 186.

2. A rule against the sureties in a bond for the release of property attached, to make them responsible where the judgment has not been satisfied, is, under the act of 20th March 1839, to be tried summarily and without a jury, unless the defendant allege under oath that the signature is not genuine, or that the judgment has been satisfied. *Beal v. Alexander*, 1 R. R. 277.

3. The surety in an attachment, though a resident of a different Parish, may, under the third section of the act of 20th March, 1839, be proceeded against, summarily, before the Court by which the original suit was decided. The object of that section was to authorize the Court before which the action was instituted, to determine all questions, principal and incidental, raised in the course of the proceedings, and thus to secure a speedy adjustment of the rights of the plaintiff. *Wallace v. Glover*, 3 R. R. 411.

4. Whenever a question arises out of a bail bond, it is incidental to the main action, and may be tried summarily without instituting a new suit. *Id.*

SURGEON.

1. Surgeons of regiments in the State militia have the same rank as those in the United States army, whose duty it is to attend those who may be wounded in the service or on parade as a militia man. *Harral v. Vanorsten*, 18 L. R. 545.

2. So a regimental surgeon cannot make a private charge and be entitled to compensation for dressing the wounds and curing a soldier wounded *on parade*, even when not in active and actual service. *Id.*

S U R E T Y.

1. A surety has the right to claim an indemnification, by instituting suit against his principal, even before making any payment; *a fortiori* when a judgment has been obtained against him, he may demand indemnification without payment. *Thompson v. Wilson's executor*, 13 L. R. 138.

2. When the surety has paid *upon, or after being sued*, even without informing his principal debtor, he has his recourse, although the debtor was in possession of the means of having the debt declared extinct. *Id.*

3. When circumstances existed at the creation of a debt which enabled the debtor to resist payment, still if he suffers his surety to remain ignorant of them, and the latter pays, he will be bound to indemnify him. *Id.*

4. The absence or insufficiency of consideration, may be opposed to the creditor, but not to the surety, *who has paid, or is liable* to pay, especially when he is ignorant of such defence. *Id.*

5. The surety, to entitle himself to the right of discussion, must pursue the formalities pointed out in art. 3016 of the Louisiana Code, or his plea will be overruled. *Allen v. Petrovic et al.*, 14 L. R. 165.

6. Sureties are not bound to show they had funds at the place of payment to meet the note at maturity. It is incumbent on the maker to provide funds. *Fort v. Cortes & Laplace*, 14 L. R. 180.

7. The sureties may oppose the want of demand of payment at the place specified, as an exception to the action against them. They may oppose to the action all the exceptions allowed to the maker, and which are inherent to the debt. *Id.*

8. The surety in a sequestration bond must reside, and have his domicile in the Parish where the suit was instituted, or the sequestration will be set aside, if the adverse party asks for it. *Gossett v. Cashell*, 14 L. R. 245.

9. The failure of one surety to demand a division *at the trial* does not authorize judgment *in solido* against him, but leaves him liable for the whole debt, in case of the insolvency of his co-sureties. *Atchafalaya Bank v. Banks et al.*, 15 L. R. 47.

10. In case a surety demands the benefit of division at the trial, judgment must be for his virile share absolutely; it cannot be for a larger sum, but not having done so, he must remain *liable* in case of the future insolvency of co-sureties. *Id.*

11. Where it appears that the *principal* is released from the obligation to account for certain moneys advanced to him, his sureties in the obligation will be discharged. *Municipality No. 2 v. Groning et al.*, 15 L. R. 166.

12. A creditor has the right, but he is under no obligation, to include the principal and surety in the same suit; and if he do, his right to judgment against the surety, does not depend on his right

to judgment against the principal. *Griffing, administratrix v. Caldwell and others*, 1 R. R. 15.

13. A surety cannot require the creditor to sue the principal debtor before resorting to him for payment; his remedy is to pay the debt, and exercise the creditor's rights against the debtor to which he is subrogated, or to proceed under art. 3026 of the Civil Code. *Id.*

14. One sued as security on the promissory note of an insolvent, may plead in compensation and reconvention an amount of money due the principal debtor, in the hands of plaintiff, for which the latter had given no consideration; and interest will be allowed on it from the date of the judgment. *Bronaugh v. Neal*, 1 R. R. 23.

15. An accommodation endorser of a note is a mere surety for the maker; and a privity exists between such surety and the creditor, which compels the latter to preserve unimpaired all his rights against the debtor, where he intends to look to the surety for payment. This obligation is a corollary of the right of subrogation, established by law in favor of the surety who pays the debt of his principal. And if the creditor fail to comply with this obligation, or destroy or impair the right of subrogation to his mortgages or privileges, the surety will be released. *Hereford v. Chase*, 1 R. R. 212.

16. The vendor of slaves, sold in a lump, received from the purchaser a note for the price, endorsed by a third person as surety for its payment, and subsequently purchased from his vendee a part of the slaves: *held*, that the vendor's privilege, and the surety's right of subrogation to it, were indivisible; that the latter existed entire as to all the slaves, for the full amount of the debt; and that it could not be divided and restricted to certain slaves, for certain amounts at the will of the original vendor; and that by such repurchase the endorser was discharged. Had the vendor repurchased all the slaves, his privilege would have been extinguished by confusion; and the subrogation to which the surety would be entitled on paying the price, would have become impossible. *Id.*

17. A rule against the sureties in a bond for the release of property attached, to make them responsible where the judgment has not been satisfied, is under the act of 20th March, 1839, to be tried summarily and without a jury, unless the defendant alleges under oath that the signature is not genuine, or that the judgment has been satisfied. *Beal v. Alexander*, 1 R. R. 277.

18. The omission in the body of a bond, of the name of one who signs it as a surety, is immaterial. *Valentine v. Christie*, 1 R. R. 298.

19. Bail are not entitled to notice of a *feri facias*, or *capias ad satisfaciendum*, issued against their principal. *Id.*

20. Where two persons have signed a joint and several bond as sureties, either may be proceeded against without the other. *Id.*

21. Where, in an action against the drawer and accommodation

endorsers of a bill, there was judgment for plaintiff against the drawer for a part of the amount claimed, but against the plaintiff as to the endorsers, and he appealed from so much of the judgment as was in favor of the latter, without making the drawer a party to the appeal: *held*, that as the drawer is not a party, the amount of the judgment cannot be changed as to her, nor encreased as to the endorsers, who must be viewed as her sureties, and cannot be made liable for a larger sum than the principal debtor. *Tenney v. Russell, and others*, 1 R. R. 449.

22. To preserve his recourse upon the surety in a bond to keep the prison bounds, the plaintiff must so conduct his proceedings as to be at all times able to subrogate the former, to all his rights and privileges against the debtor. *Comstock v. Creon*, 1 R. R. 528.

23. A debtor, arrested on a *capias ad satisfaciendum*, having given security to keep the prison limits, the plaintiff, on discovering property, took out a *fieri facias*, and seized it, whereupon, the debtor made a voluntary surrender for the benefit of his creditors, which was accepted by the judge, and on the same day broke the limits, when all proceedings having been arrested, the *fieri facias* was returned. On the opposition of plaintiff, the surrender was rejected; and the latter, having abandoned his *fieri facias*, sued the security on his bond. *Held*, that the *fieri facias* was legally issued, and gave a lien on the property; that the surrender having been set aside the plaintiff might have proceeded to make his money; and that by neglecting to do so, the surety was released. *Id.*

24. One who becomes bail for another, on a guaranty from a third person to indemnify him for any loss he may be subjected to in consequence, is under no obligation to notify the latter of any steps taken to render him liable. *Fisk v. Comstock*, 2 R. R. 25.

25. Bail may coerce the surrender of their principal. *Id.*

26. The obligations of co-sureties to pay their portions to the surety who has paid the whole debt, and the proportion in which they are bound to pay, depend upon the law, and not upon the contract. They are bound severally, to pay their respective proportions, and the surety who has paid the whole debt is subrogated to the rights and actions of the creditor, and entitled to recover the rate of interest which he paid. *Rothschild v. Bowers*, 2 R. R. 380.

27. Under act 2157 of the Civil Code, subrogation will take place, of right, in favor of one who has paid the debt he was interested in discharging: *first*, where he was bound *for* another; *secondly*, where he was bound *with* another; and *thirdly*, where he was bound *for the same debt for which another was bound*. The two first cases are provided for expressly; and subrogation will be implied in favor of the person bound for the debt for which another was bound, on the presumption that he was induced to bind himself in consequence of the responsibility of the principal having been guarantied by the party first bound. *Id.*

28. He who is bound *for* another, or *for the same debt as another*,

and pays the creditor, is subrogated to all the rights of the latter against the principal; but as to those *with whom* he is bound, he will be subrogated only for their virile portions. *Rothschild v. Bowers*, 2 R. R. 380.

29. Where security is required to be given by order of Court, the person offered must be a resident of the State. *Id.*

30. The sureties on a bond given for the release of property attached, the condition of which is that they shall satisfy whatever judgment may be rendered in the suit, though not parties to the action, may plead the nullity of the judgment, when called upon to satisfy it. Their undertaking was, to satisfy a judgment legally obtained. When a judgment is absolutely null, any one having the least interest in opposing its effect, may have such nullity pronounced. *Quine v. Mayes*, 2 R. R. 510.

31. The liability of a surety in an official bond, attaches from the moment the principal is in default. *Dougherty v. Peters*, 2 R. R. 534.

32. In an action against the sureties of a public officer to recover an amount due to the plaintiffs from the latter, judgment should be rendered for the sum actually due, and not for the whole penalty of the bond to be satisfied by the payment of the amount so due. *Id.*

33. Where several Courts have concurrent jurisdiction of actions against the sureties of a public officer, no one of them can condemn the sureties to bring into Court the amount for which they may be ultimately responsible, and discharge them from further liability. The creditors cannot be compelled to come into that tribunal for redress. The judgment should be only, for the amount due to the plaintiff. *Id.*

34. Where the sureties of a public officer bind themselves, severally, for a specific sum, they can in no event be made liable for a larger amount; but any one injured by the misfeasance of their principal, will have an action against each and all, until the whole amount for which they may be respectively bound shall be exhausted, or the claim satisfied. *Id.*

35. Subrogation whether legal or conventional, invests the person in whose favor it takes place, with all the rights, actions, privileges, and mortgages of the creditor against the debtor. *King v. Dwight*, 3 R. R. 2.

36. One who has paid the debt due to a plaintiff, and been expressly subrogated to his rights, may take out execution against the defendant. Such an express subrogation, is equivalent to an authority to use the plaintiff's name in prosecuting the suit for the recovery of the debt. *Id.*

37. An accommodation endorser must be viewed in the light of a surety, and as such is entitled to discuss the property of his principal. *Dwight v. Linton*, 3 R. R. 57.

38. The purchaser of property sold under a *fi. fa.* on twelve month's credit, having offered defendants' testator to the sheriff as

security for the price, received a blank bond from the sheriff to be signed by himself and the testator, and filled up on his return. The bond was signed, but not returned to the sheriff till after the death of the surety, which happened a few days after he signed the instrument, when it was filled up. *Held*, that the security having been previously approved by the sheriff, the contract was complete by the signature of the former. *Wells v. Moore*, 3 R. R. 156.

39. The sureties on a bond given by a sheriff for the collection of the Parish taxes, cannot, when sued as sureties for a portion of the taxes collected but not paid over by the sheriff, contest the legality of the ordinances of the Police Jury making the assessment. By receiving the tax roll, and executing the bond, the sheriff and his sureties recognized the authority of the Police Jury. It is too late to contest the validity of their ordinances, after having acted under them, and collected the taxes. *McGuire v. Bry*, 3 R. R. 196.

40. Notice to a principal that, if he do not pay before a certain time, suit will be commenced against him, is not such an agreement for indulgence as precludes the party from suing, and thereby discharges the surety. *Id.*

41. Bond in the sum of \$8935 for the collection of the Parish taxes, agreeably to the assessment roll. The taxes for ordinary parochial purposes amounted to \$3573 66, and there was a special tax, of an equal amount, collected for a particular purpose. In an action on the bond: *held*, that the sureties were bound for both, it being improbable that a bond would be executed for \$8935 to secure the payment of \$3573 66 only. *Id.*

42. Where in an action against sureties who are bound jointly only, they claim in their answer the benefit of division, and it is not alleged that either is insolvent, the judgment must be against each for his virile portion. *Id.*

43. A surety who binds himself with his principal, *in solido*, is not entitled to the benefit of discussion; and may be sued alone for the whole debt. His obligation must be regulated by the principles applicable to debtors *in solido*. C. C. 3014. *Smith v. Scott*, 3 R. R. 258.

44. Under the act of 28th February, 1837, actions against the sureties of a sheriff, on his official bond, are prescribed by the lapse of two years. *Mulhollan v. Henderson*, 3 R. R. 297.

45. A prolongation of the term granted to the principal debtor, without the consent of the surety, will release the latter. C. C. 3032. *Calliham v. Tanner*, 3 R. R. 299.

46. A surety who pays the debt of his principal, is entitled to all the rights of the creditor against the latter; for, however desperate his situation may be at any particular time, it may improve, and offer, ultimately, complete indemnity. *Id.*

47. A party who seeks to render another liable for the debt of a third person, must prove such liability beyond all doubt, or he cannot recover. C. C. 3008. *Hazard v. Lambeth*, 3 R. R. 378.

SURVEY.

1. In all surveys, courses and distances must yield to natural and ascertained objects. *Wells v. Compton*, 3 R. R. 171.

SURVEYOR, PARISH.

1. Parish surveyors are regularly appointed officers known to the law, and when dead, their declarations taken in other suits, may be used, when necessary, as evidence to explain their acts. So plats made by a Parish surveyor under orders of Court, in a suit to which defendant was a party, are admissible after the decease of the former, to prove the declarations of the defendant made at the time of the survey. *Wells v. Compton*, 3 R. R. 171.

2. The official acts and certificates of Parish Surveyors are entitled to full faith and credit, in all the Courts of this State. *Id.*

3. The *procès-verbal* of a survey made by a Parish Surveyor, is legal evidence of the acts which it recites, as that notice was given, that the parties attended, etc. *Id.*

SYNDIC.

1. When a syndic has been legally appointed, no individual creditor can sue him for a debt, or interfere with his administration. A creditor may call him to account, and produce his bank book, etc., but he can not be harrassed by suits, and with alleged fears of mismanagement, etc. *Lillard v. Tarbe, syndic*, 15 L. R. 421.

2. For malfeasance or gross negligence, a syndic may be removed from office in due course of law, and made liable for damages in his individual capacity. *Id.*

3. The syndicism in a personal trust which cannot be delegated to another. The syndic may empower an agent to do a particular act, especially in a place distant from his domicile. *Hughes v. his creditors*, 15 L. R. 446.

4. The Court is not authorised to remove a syndic from office for mere absence from the State, no matter how short. It is not a momentary absence, but the neglect of the interests confided to him, that justify his removal. *Id.*

5. The creditors should be the judges whether their interests require another syndic should be appointed; who, although under the supervision of the Court, is properly the mandatory of the creditors. *Id.*

TAXES.

1. Oppositions to the valuation and assessment of property in the City of Lafayette must be made within the time prescribed and advertised, or they will not be listened to in Court. *Council of Lafayette v. Kohn*, 19 L. R. 94.

2. The assessment roll is admissible in evidence, to show that taxes were duly assessed. If defendant objects, that it is not the true one, he should show it, and call for the right one. *Id.*

3. Under the act of the 15th of March, 1830, the owner of lands sold for taxes due to the State, may redeem the same, in the case of non-residents at any time within two years, and in all other cases within one year. *Winchester v. Cain and another*, 1 R. R. 421.

4. The law authorising the redemption of lands sold for taxes, will be interpreted liberally. *Id.*

TENDER.

1. An offer to deliver a box of goods after suit is commenced, without tendering the costs, does not possess the requisites of a legal tender. *McMaster & Hyde v. Brander et al.*, 15 L. R. 206.

2. The plea of the general issue and averment that the goods *described in the petition*, were tendered and delivered, does not admit their *value*, as alleged by the plaintiff, and dispense with proof of it. *Id.*

3. In a redhibitory action for the rescission of the sale of a slave, an offer to return the slave in sufficient, if rejected, without an actual tender. *Armstrong v. Mooney*, 1 R. R. 167.

THIRD PERSONS.

1. The law gives no effect to acts of alienation against *third persons* in general, unless they have been recorded. By *third persons*, must be understood, all persons who are not parties to a contract by which their *interest* in the thing conveyed is sought to be affected. *Brosnahan et al. v. Turner*, 16 L. R. 442.

2. So the debtor whose property is sold at sheriff's sale, or those who claim under him, cannot object that the purchaser's title was not legally conveyed or transferred to the defendant who claims under it. *Id.*

3. Third persons cannot contest the validity of a sale and a transfer of a judgment between others, as being simulated. It is only the heir or creditor of the owner, whose right or interest may have been affected or prejudiced by the transfer, who can complain. *Randall v. Bank of Louisiana*, 17 L. R. 273.

THIRD PURCHASER.

1. A third purchaser of an estate subject to certain mortgages, which he assumes to pay, cannot set up her claims in opposition to the mortgage creditor on said estate. *Kenner & Co's syndic v. Holliday et al.*, 19 L. R. 154.

2. The creditors of an estate are not bound to give security to the purchaser before coming on him for their claims due by it, on the ground that he is in danger of eviction. The right to call on a party to give security implies a warranty against eviction. *Id.*

3. A third person contracting to pay the debt of another and receiving property out of which it was to be paid, cannot oppose the plea of usury, or go into the consideration of that debt, and retain the means placed in his hands to pay it. *Id.*

4. Where the purchaser is actually disturbed in the possession and enjoyment of the thing sold, he can require security before the payment of the price can be demanded. *Ball et al. v. Lebreton et al.*, 19 L. R. 147.

5. A *bonâ fide* purchaser, without notice, is not affected by fraud in his vendor, who has a legal title to the property sold. *Blanchard v. Castille*, 19 L. R. 362.

6. A third person who did not sign a notarial act of sale, although it expresses on its face that the price was paid, by the vendee in cash, may show by parole evidence, that in fact it was paid partly in cash, which he advanced, and by his note for the balance. *Benoit v. Broussard*, 19 L. R. 387.

TREATY OF SAN ILDEFONSO.

1. The transfer by the king of Spain of the sovereignty of Louisiana to the French Republic, was not complete by the treaty of San Ildefonso, of the 1st October, 1800, nor by that of Madrid, of the 21st of March, 1801. Spain continued to be the sovereign *de facto*; and the terms of those treaties do not necessarily import a change of sovereignty *de jure*, but only convey the idea of a promise to cede on the performance of certain conditions precedent. The first authentic evidence of any admission by the king of Spain that the conditions had been performed by the French Republic, or of any act towards the execution of the promise stipulated in those treaties, is in the *cédula* or royal order of the 15th of October, 1802, the terms of which are inconsistent with the idea that the sovereignty of Louisiana had already vested in the French Republic. *Kenton v. the Baroness of Pontalba*, 1 R. R. 343.

2. The royal order of the king of Spain for the retrocession of the territory of Louisiana to the French Republic, was dated the 15th of October, 1802; the appointment of commissioners to de-

liver possession, was made on the 18th of May, 1803; and the final surrender of the colony was made on the 10th of November following. *Kenton v. the Baroness of Pontalba*, 1 R. R. 343.

3. Congress has never decided that the sovereignty of Louisiana was changed at the period of the treaty of San Ildefonso. *Kenton v. the Baroness of Pontalba*, 1 R. R. 355.

TRESPASSERS.

1. Trespassers are jointly liable in actions of tort; and where there are several trespassers, they must all be joined in the same action, and judgment entered in relation to all; and if against them, each one is condemned for his proportion of the damages. *Lousade v. Hartman et al.*, 16 L. R. 117.

2. So, where four persons were sued as co-trespassers, for killing, or causing the death of a slave, and judgment taken against two only: *held*, that the judgment was erroneous in not including *all*, and against each one, for his proportion of the plaintiff's damages; and judgment of non-suit was rendered. *Id.*

TRIAL.

1. Action for \$90 paid to defendant, in error, as owner of a butcher's stall, and for \$2,000. Damages for forcibly turning plaintiff out and retaining the possession of the stall. Plaintiff having obtained a rule on defendant to show cause why he should not be put in possession, it was made absolute, and defendant appealed. *Held*, that the Court erred in ordering a part of the case to be tried on a rule, and leaving the remainder untried. A case should not be tried on any other day than the one fixed by the Court when called in its turn. C. P. 463. *Gerber v. Marzoni*, 3 R. R. 370. *Beaudoin v. Rochbrun*, 3 R. R. 372.

TRUST.

1. There is nothing in the laws of this State to prevent property from being held in trust for the use of another, where all parties interested assent; and such a naked trust, to be executed within a reasonable period, does not amount to a substitution. *Malone v. Barker*, 2 R. R. 369.

2. A trustee, who claims property in this State, under a deed of trust executed in another for the benefit of a third person, will not forfeit his rights thereto by granting a delay to the debtor, any more than a mortgage creditor by giving time to his debtor. *Id.*

TRUST, DEED OF.

1. A conveyance of slaves, in another State, to a trustee, for the use of the owner during her life, and for the purpose of being emancipated afterwards, vests a legal title in the trustee, who may sue in this State to enforce the trust. *Jordan v. Black*, 1 R. R. 575.

TUTOR.

1. Proceedings had *ex parte*, homologating a tutor's account, when there is no opportunity given to the heir at law to contest the account, are illegal, and do not form the exception of *res judicata*, when the tutor is sued by the heir of the deceased pupil to render an account. *Gillespie v. Day*, 14 L. R. 289.

2. Where the testator appointed his executor, also tutor of his minor child, and directed that he keep the share of his child until he become of age, and the executor renounced the tutorship: *held*, that he is bound to pay over the funds of the minor to the tutor afterwards appointed. *Percy, tutor, etc. v. Provan's executor et al.*, 15 L. R. 69.

3. The new tutor is bound to invest the funds as provided in the will, as the power of administering the estate of a minor, is exclusively given by the law to the tutor. *Id.*

4. So, the attorney of absent heirs cannot interfere with the person or estate of a minor heir, while he is under the care and control of a tutor. *Id.*

TUTOR AND TUTRIX.

1. The widow as tutrix of her minor children, may be removed to avert waste or dilapidation of their property, but until destitution of office, she has a right to demand the possession of her children's estate from the executor. *Clague's widow v. Clague's executors*, 13 L. R. 1.

2. The widow, as tutrix of the minors, who are forced heirs of the testator, may, at any time, demand and take the seizin of the estate from the testamentary executors, on offering them a sufficient sum to pay the moveable legacies. *Id.*

3. The creditor of a succession inherited by minors, under the tutorship of the administrator, cannot institute suit for the removal of the tutor for malversation in office. No one can institute this action, without being properly authorised by the Court of Probates, as required by the art. 1016 of the Code of Practice. *Thompson v. Hutchiss, tutor, etc.*, 13 L. R. 66.

UNITED STATES, OFFICERS OF.

1. A rule cannot be taken on an officer of the United States, in his official capacity, to show cause why he should not pay over money, seized in his hands under a *fi. fa.* as the property of a third person. To condemn him to pay as an officer, would be to condemn the Government, which cannot be done. *Mechanics' and Traders' Bank of New-Orleans v. Hodge*, 3 R. R. 373.

USURY.

1. There is no usury in the sale of a note, although more than the highest rate of conventional interest was deducted, if the vendor does not endorse it, and is not a party to it. *Nott et al. v. Papet et al.*, 15 L. R. 306.

2. It is of the essence of the contract of loan that he who receives money is bound to return it, and to which alone usury attaches. *Id.*

3. A person contracting to pay the debt of another, and receiving property out of which it was to be paid, cannot oppose the plea of usury; or go into the consideration of the debt, and retain the means placed in his hands to pay it. *Kenner & Co's syndic v. Holliday et al.*, 19 L. R. 154.

4. Usurious interest which has been paid, cannot be recovered back. *Id.*

5. Where A. gave his note to B. for \$11,000 payable in two years, and received in payment the note a third person, endorsed by B., for \$10,000 payable ten days after his own: *held*, that it was an agreement to give and receive usurious interest, and null. *Flower v. Millaudon*, 19 L. R. 185.

6. An agreement to take even a legal rate of interest, on a larger sum than is *really due*, is usurious. *Id.*

7. So, an agreement to make cash advances at 10 per cent interest thereon, and to receive, one third of the profits of the firm to which the advance was to be made, was held to be usurious. *Id.*

8. Accounts which have not been objected to and received by the party, although they contain extravagant charges and usurious interest, will not be re-opened in a suit for a final settlement. Usurious interest once paid cannot be recovered back. *Id.*

9. A third person, not a creditor, having advanced money to defendants, at an usurious interest, on certain articles held as security for its re-payment, which advances were applied to the benefit of the creditors of the latter, on a seizure by plaintiffs under an execution against defendants: *held*, that such third person ought to lose the usurious interest exacted by him; and that the difference between the sum advanced and the real value of the articles is all that was liable to seizure. *Taylor v. Whittemore*, 2 R. R. 99

10. By the laws of this State, a contract tainted with usury, is voidable only as to the usurious interest and valid as to the principal. *Walden v. City Bank of New-Orleans*, 2 R. R. 165.

VENDOR AND VENDEE.

1. The vendor of a lot of ground, situated in the limits of the Draining Company, is not responsible in any way to the purchaser, for the mortgage and claim which the company may have on the property sold for draining and enhancing the value; nor can the latter withhold the price or compel security to be given, as in case of a disturbance. *Municipality No. 1 v. Leroy*, 15 L. R. 147.

2. In the executory proceedings on an act of sale containing the pact *de non alienando* against mortgaged property, in the hands of the last vendee, in which no notice is required, the latter is not bound to call his vendor in warranty. *Carter v. Caldwell*, 15 L. R. 471.

3. The intermediate vendors sell with a knowledge of the first vendor's rights to go against the property, and the consequent danger of eviction of their vendees, against which they have guaranteed; *Id.*

4. The intermediate vendor's obligation is to do, without notice, what he would be bound to do if called in warranty, which is to pay the debt to the original vendor, or see it paid. *Id.*

5. So, the last vendee when evicted, has a right to recover from his vendor the amount he has paid, who has the same rights against his vendor. *Id.*

6. Where the certificate and act of the Notary recites the sale, and specifies the title papers to be delivered, and states, that at the request of the vendor, he had delivered them to one of the vendees, for himself and co-vendees, who acknowledges the receipt of them, it is sufficient evidence of their delivery on the part of the vendor. *Rightor v. Kohn et al.*, 16 L. R. 501.

7. Where the vendor exhibits his titles before the sale, and they are examined and set forth in the act, the vendees cannot set up any other informalities or nullities in them, than were specified at the time. *Id.*

8. A mere expression of dissatisfaction of the titles which had been exhibited and accepted, will not authorize the vendee to delay payment; and when not evicted, even if he is in danger, it is no reason to withhold payment, if security is offered. *Id.*

9. A delivery of the muniments of title to one of several co-vendees, is a sufficient delivery to all of them. *Id.*

10. Where vendees sue a third person for slander of title, or allege the government has sold part of the premises, but no disturbance is shown, it furnishes no ground to resist payment; they can only require security. *Id.*

11. Where the vendees affect and mortgage the premises to secure the punctual payment of the price, the vendor has his privilege and mortgage for the payment of any portion of it, as it becomes due. *Rightor v. Kohn et al.*, 16 L. R. 501.

12. Where a suit has been brought for the premises, and afterwards dismissed, or the plaintiff non-suited, it will not operate a disturbance, so as to authorize the vendee to resist payment. *Id.*

13. Where the vendor sells all his right to the land back of that on which he resides, it will be considered as a sale at the purchaser's risk, which implies no warranty, and the questions of eviction and probable disturbance have no application to it. *Laville v. Rightor*, 17 L. R. 303.

14. Where the price is not paid, the vendor may obtain the rescission of the sale; and the Court will fix a day on which, if the price is not paid the sale will be rescinded. *Id.*

15. The defendant contracted under a penalty to buy the plaintiff's plantation for a certain sum, payable in a year, but to be discharged on the vendor's obtaining a loan from Bank on mortgage of the premises by the vendee's taking his place: *held*, that as soon as the loan was obtained, the purchaser is liable to the *penalty* when he failed to take his vendor's place as debtor to the Bank. *Nettles v. Scott*, 17 L. R. 336.

16. The last purchasers or vendees, who assume the notes of their immediate vendor, given to his or the original vendor, cannot resist payment on the ground of any equities or conditions existing between them and their immediate vendor. The plaintiff or first vendor is a stranger to them. *Arnous v. Davern et al.*, 18 L. R. 42.

VERDICT.

1. A verdict for the dissolution of a partnership, when that part of the plaintiff's prayer is not expressly objected to by the defendant, cannot be complained of; and when supported by testimony rejecting his claim in reconvention, the verdict will not be set aside. *Peire v. Martin*, 14 L. R. 64.

2. The misconduct of a juror, will not be deemed sufficient ground to set aside the verdict, if, from the evidence, the Court believe impartial justice has been done. *Id.*

3. Where damages are complained of as excessive, the assessment of them is considered so peculiarly the province of the jury, that the verdict will not be disturbed, without evident grounds. *Quatreveaux v. Caboche*, 14 L. R. 365.

4. A verdict which gives interest from judicial demand, is sufficiently certain, as the record specifies the day when interest commences. *Gay v. Ardry*, 14 L. R. 288.

5. A verdict for the plaintiff, without specifying any sum, is defective and illegal, when the suit is for a money demand, and will be set aside. *Collings v. Hamilton*, 14 L. R. 343.

6. The Supreme Court, on setting aside the verdict of a jury, will render final judgment in the case, if the evidence and facts in the record enable it to do so. *Id.*

7. The verdict of a jury on mere matters of fact, brought out by the answers of the parties to interrogatories propounded to each other, will not be disturbed without good ground. *Burton v. Hoff*, 14 L. R. 348.

8. Questions of fact, and the *quantum* of damages in actions of slander, are so peculiarly the province of the jury, that their verdict will not be disturbed unless manifest injustice has been done. *Howe v. Frazer*, 14 L. R. 375.

9. It does not necessarily follow that a verdict is to be set aside on account of the admission of improper evidence; as where proof of notice to an endorser is not satisfactory, a verdict in his favor will not be disturbed. *Briggs v. Strafford*, 14 L. R. 381.

VOYAGE.

1. A creditor for supplies furnished a ship or vessel, has a lien or privilege on the vessel for *those* furnished *before* her departure, if she has already made a voyage; but this voyage must be considered as made to another port, and a *return to the port of departure*, before it is completed; otherwise the privilege could never be claimed or enforced. *Blake v. Bredall*, 15 L. R. 545.

2. Claims against a vessel, ship or steam-boat, on the last voyage, for wages, supplies or materials furnished, etc., for which the Code gives a privilege, will be allowed when the services, supplies, etc., have been rendered and furnished within and during the last sixty days before the suit. *Shirley v. Fabrique*, 15 L. R. 140.

3. Sixty days will be taken as the duration of the *last voyage*, within which all privileged claims against vessels, or steam-boats depending on this voyage, must be presented and enforced. *Id.*

WAGES AND WORK BY THE JOB.

1. Whether a contract be proved or not, a party will be allowed a reasonable compensation for his work done for the defendant, who is not to be benefited by it, without making compensation. *Peterson v. Short*, 15 L. R. 159.

2. Where it is shown that workmen refused to work by the job, the jury may allow their account for materials and work done, or

so much as they think right, from all the circumstances and testimony adduced. *Varion et al. v. Dupeyre*, 15 L. R. 260.

3. When there is no formal delivery of work, if it is shown that the owner called for a detailed statement of what had been done, and said his negroes would finish the balance, it will be sufficient to charge him, and release the workman from a formal delivery. *Id.*

4. Where an engineer of a cotton press was employed by the year, at a fixed salary, and was discharged before the end of the year, without any other cause than that his services were no longer required by the company; it was held, that he is entitled to recover his salary for the whole term. *Sherburne v. Orleans Cotton Press*, 15 L. R. 360.

5. The engineer was entitled to receive his full salary as soon as he was discharged; and no condition could be afterwards imposed by his employer to return and perform his service for the remainder of the year. *Id.*

W A L L .

1. A co-proprietor is at liberty to increase the height of a wall, held in common, at his own expense, and if the common wall is unable to support the additional weight of the new one, he is bound to rebuild it anew, at his own expense, taking the additional thickness from his own property. *Pierce v. Musson*, 17 L. R. 389.

2. But an adjacent proprietor has no right to cut away part of the foundation of his neighbor's wall or house, or to cause the projections of his wall to rest on that of his neighbor, if it cause injury or damage, and for which he is responsible if he exercises his right, without due precaution. *Id.*

3. The appointment of experts is a mere precaution, and will not have the effect of discharging the neighbor from the obligation of *repairing the injury* caused by the new work. *Id.*

4. So, where defendant cut away part of the foundation of plaintiff's wall, and erected his new one thereon, causing damage by cracking and breaking plaintiff's wall, he is liable for all the damage occasioned thereby. *Id.*

5. It is no excuse against the payment of these damages, that the plaintiff made no opposition or objection to the erection of the defendant's new wall. The latter made his new work at his own risk. *Id.*

WARRANTY.

1. The defendant may place the plaintiff *in duriori casu*, when

he exercises a legal right resulting from the action against him. Thus the plaintiffs and defendants in an execution and judgment, may be *cited in warranty*, by the purchaser at sheriff's sale, when he is in danger of eviction. *Guerin et al. v. Bagneries*, 13 L. R. 14.

2. Where a warrantor is called in by the defendant, and the sheriff's return shows that he has not been found, it is the duty of the party calling him, to use all diligence to have him cited; or a *curator, ad hoc*, appointed to represent him, if he resides out of the State. *Zimmer v. Thompson et al.*, 13 L. R. 22.

3. Warrantors need not be made parties to the appeal, when it is expressly agreed that the case shall first be tried, as between the original parties. *Beard et al. v. Poydras*, 13 L. R. 82.

4. Where the purchaser under execution is evicted he is entitled to judgment over against the *seized debtor* or seizing creditor, on his warranty; but under art. 711 of the Code of Practice, *he must first take out his execution* against the former and on the return of *nulla bona* may proceed against the latter. *Guerin's heirs v. Bagneries*, 18 L. R. 590.

5. According to the provisions in articles 379, 380 and 381 of the Code of Practice, the vendee of a slave, when sued for the price, will be allowed time to cite in warranty the person to whom he sold, and who promised to pay the debt, although the plaintiff, or original vendor, never accepted him as his debtor. *Brown's executor v. Copley & Jessup*, 19 L. R. 473.

W I L L :

1. A Disposition by will, in which the property of the estate is to remain in the hands of the executor until the testator's children or heirs arrive at the age of majority, cannot be distinguished from one that would authorize the executors to keep and preserve it for, and return the estate to them; and is a *fidei commissum*, or trust, which is forbidden by law. *Clague's widow v. Clague's executors*, 13 L. R. 1.

2. The testator cannot extend the period of executorship to more than a year; nor direct that the estate remain in the hands of the executors afterwards, or that they keep and preserve it for another or others, when there are forced heirs present. *Id.*

3. A will dictated in Spanish, the native tongue of the testator, and a memorandum thereof taken down in french, by the notary, which is read to the testator; approved by him as expressing *his intentions*, and drawn up in the English language, of which the testator is ignorant, but is signed by him, the notary and witnesses, is null and void under the 1571 art. of the Louisiana Code, which requires that a will should be written by the notary, *as dictated*. *Gonzales et al. v. Gonzales*, 13 L. R. 104.

4. When a foreign will, duly authenticated and admitted to probate, in the country of the testator's domicil, is presented for registry in a Parish of this State, and no dative testamentary executor is asked; and it not appearing that there are any creditors, heirs or legatees, here, and the property is *moveable*, the judge of probates, in such cases, is bound to admit the registry and execution of the will, without any other form than that of registry. *State v. Judge Bermudez*, 13 L. R. 221.

5. A *copy* of a foreign will, authenticated only by an *exparte* affirmation of an attorney in fact, is insufficient to authorize the judge of probates to register it in this State. *State v. Judge Bermudez*, 14 L. R. 379.

6. Where a nuncupative will, by public act, states, only, that the testator declared, in the presence of witnesses, that the instrument contained his last will and testament, being dictated to the notary in the presence of the witnesses, is *insufficient* and *null* for informality, there being no mention of its having been *dictated by the testator to*, and written by the notary, as dictated. *Verdun's heirs v. Verdun's executor and legatees*, 15 L. R. 28.

7. There must be five witnesses to a nuncupative will, under private signature, unless it is made in the country, and a greater number than *three witnesses* cannot be obtained, which must be made to appear. *Id.*

8. A clause in a will or testament, which extends the powers of executors in their mere capacity as such, to enable them to keep the funds of the succession in their hands after they have become *functi officio* ought to be considered as not written. *Percy, tutor v. Provan's executor et al.*, 15 L. R. 69.

9. Provisions in a will appointing a tutor to the sole minor child, and also directing him to be sent out of the country, to his grandparents, until he comes of age, cannot both be executed. If the minor be put under a tutor, he must remain here until majority. *Id.*

10. Where it is shown that a testator was subject, from intemperance, to spells of insanity, which became general by long indulgence, but the witnesses to the will testify that he was sober and rational at the time of signing, he will be deemed competent to make a valid will. *Hart v. Thompson's executor and legatees*, 15 L. R. 88.

11. Sealing and closing a mystic will with wafers, and making the witnesses sign across and between the wafers on the envelope, is a sufficient sealing and enclosing within the meaning of the law, without the use of impress of a seal. *Id.*

12. Parol evidence is inadmissible to show that all the formalities of a nuncupative will, by *authentic act*, have been fulfilled. It must make full proof on its face. *LeBlanc v. Barras's heirs*, 16 L. R. 80.

13. Where there are but three witnesses to a will by *authentic act*, express mention must be made in the will, that they *reside* in

the place where the will is executed. *LeBlanc v. Barras's heirs*, 16 L. R. 80.

14. The formalities required to be pursued in a will by *authentic act*, express mention must be made in the will itself, of their fulfilment, on pain of nullity of the entire instrument. *Id.*

15. A foreign will, or one made in another State, *duly proved* in a competent Court where it is made, the executors appointed by the testator may continue to act in this State, when the will has been registered in the Court of Probates in this State, where the property is situated. *State v. Judge of Probates of New-Orleans*, 18 L. R. 570.

16. So foreign wills or those made in other States do not require the appointment of a dative testamentary executor and an attorney for absent heirs, when ordered to be enregistered in this State. The executors or administrators appointed or qualified to act under the will in the place where it is probated can act under it in relation to property here. *Id.*

W I L L S .

1. The admission of a will to probate and the order given for its execution are only preliminary proceedings, necessary for the administration of the estate, and do not amount to a judgment, binding on those who are not parties to them. *Robert, f. w. c. v. Allier's agent*, 17 L. R. 4.

2. Courts of general jurisdiction cannot sustain an action to establish a will, and decree its execution; and also the recovery of property claimed under it. *Id.*

3. Whenever the validity of a will is attacked and put at issue at the time that its execution is applied for; or after it has been regularly probated and ordered to be executed, but previous to the heirs or legatees coming into the possession of the estate under it, *Courts of Probate alone have jurisdiction.* *Id.*

4. In an action by an heir at law against the testamentary heir or universal legatee, who is in possession, and sets up the will as his title to the property, the District Courts or Courts of general jurisdiction are the proper tribunals in which such suits must be brought. *Id.*

5. In France, proof of the execution or signature to an olographic will is not required to make it executory. In Louisiana it is otherwise. *Id.*

6. So, where a will, made in a foreign country, *has not been proved*, because the laws of that country did not require it, before ordering it to be executed, it cannot be registered or carried into effect in Louisiana, without being first duly proved before one of our Courts of Probate. *Id.*

7. Foreign wills must be proved in the manner provided by the laws of Louisiana, if it is not shown that they have been duly proved in the country where made. *Robert, f. w. c. v. Allier's agent*, 17 L. R. 4.

8. So an olographic will, made in France and deposited in the office of a notary public there, for execution, without proof of the signature, will not be carried into effect in Louisiana, until it be duly proved here in the Court of Probates. *Id.*

9. Where a copy of a foreign will is presented to the judge of probates in this State, together with authentic evidence of its having been duly approved and ordered to be executed in the country where it was received or made, it is the duty of the judge to order the registry and execution of the will. *State v. Judge of Probates of New-Orleans*, 17 L. R. 486.

10. The registry and execution of a foreign will may be made, when the case requires it, without any appointment of administrator or dative testamentary executor. *Id.*

11. Where one of several executors of a foreign will, duly proved and ordered to be executed, presents himself for letters testamentary under the will here, and the case is a proper one, he should be recognized and authorised to act by the Court of Probates under its control and supervision. *Id.*

12. The judge of probates is in no case authorised to appoint a dative testamentary executor, until the executor named by the will has had an opportunity to accept or refuse the trust. *Id.*

WITNESS.

1. The father of one of the parties, called in warranty by the defendant is an incompetent witness to testify on behalf of the plaintiff. *Guerin et al. v. Bagneries*, 13 L. R. 14

2. The declaration of a witness on his *voire dire*, touching his interest and connection with one of the parties to the suit, are entitled to greater credit than his statements to a third person, when not under oath. *LeBret v. Belzons* 13 L. R. 93.

3. An agent is a competent witness for his principal in all cases, except where suit is brought against the principal on account of the negligence of the agent. *Nicholson, tutor, etc v. Patton*, 13 L. R. 213.

4. So, in an action for the recovery of a lost note, against a broker who bought it of a Notary's clerk, the Notary was received as a competent witness to prove that his clerk had purloined the note from his office, and sold it to the defendant, notwithstanding he was the agent with whom the note was deposited, to demand payment. *Id.*

5. The deposition of a witness taken before a commissioner,

who was twice examined and cross examined, by the defendant, *without objection*, will not be rejected on the trial, at the instance of the latter, on the ground that the witness was incompetent to testify. *Goldenbow v. Wright*, 13 L. R. 371.

6. The competency of a witness, or his interest in the matter in controversy, may be ascertained by examining him on his *voire dire*; if the party objecting does not choose to do this, the party offering him may rebut the presumption of his incompetency by other evidence. *Denton v. Commercial and Rail Road Bank of Vicksburg*, 13 L. R. 486.

7. The partner of a firm, subscribed as security to an attachment bond, who was absent when the name of the firm was signed, is *prima facie*, a competent witness to testify in the case. *Id.*

8. The circumstance of a witness being the clerk of the plaintiffs, and brother to one of them, does not destroy or diminish his credibility. *Frost & Johnson v. Bebout et al.*, 14 L. R. 104.

9. A notary public, who signed the protest, cannot be received as a witness to prove that no demand was made. A public officer who has given a solemn certificate in his official character; and under his seal of office, cannot be listened to as a witness to prove it false. *Briggs v. Stafford*, 14 L. R. 381.

10. Where a witness swears *positively* to a signature without being interrogated as to his means of knowledge, it is sufficient. It would be otherwise, if he was interrogated, and failed to give a satisfactory answer. *Dwight et al v. Scates*, 14 L. R. 495.

11. A witness who swears to the best of his recollection, does not swear positively, and his testimony is insufficient to establish a positive fact for want of certainty. *Babcock et al. v. Eldridge*, 15 L. R. 149.

12. Where the witnesses are of equal credibility, and differ in their testimony, the one having the best opportunity to know the facts testified to, will be entitled to the most weight. *Forsyth v. Despierris's executors*, 15 L. R. 215.

13. The testimony of several witnesses, who swear positively to a transaction and discharge of the defendant from the debt sought to be enforced, will outweigh the testimony of a single witness to the contrary who was not present all the time of the transaction. *Delafield et al. v. Sherwood*, 15 L. R. 271.

14. A witness will not be allowed to testify that he is ignorant of the law in relation to a certain transaction, as his want of knowledge is immaterial, and he is bound to know the law. *Brander et al. v. Ferriday, Bennett & Co.*, 16 L. R. 296.

15. Where witnesses declare on their *voire dire* that they are, and believe themselves interested in the event of the suit; they are incompetent to testify. *Brumgard v. Anderson*, 16 L. R. 341.

16. An agent interested only to the amount of his commissions is a competent witness for his principal; but when his interest is distinct and not growing out of his agency, he is incompetent.

Stetson, Avery & Co. v. Gurney; Robertson, intervenor, 17 L. R. 162.

17. The Parish Treasurer is a competent witness for the Parish in a suit, by the police jury against the sheriff for the Parish taxes. *Police Jury of Iberville v. Sherburne et al.*, 17 L. R. 342.

18. The cashier of a Bank, acting as its agent, is a competent witness to testify in relation to the collection of monies, settlement of its claims and the sums of money due to and received by it. *Williams v. Bank of Louisiana*, 17 L. R. 378.

19. Affidavits of witnesses sworn to before the clerk not in open Court, do not constitute that proof which is required by law. *Sandeman v. Deake & Willard*, 17 L. R. 332.

20. Clerks of Courts have no authority out of the presence of the Court to swear witnesses and take down their testimony in a cause. They are only to administer oaths in open Court, and out of it in cases of arrest, attachment, provisional seizure, or generally in any conservatory measure required by one of the parties to a suit. *Id.*

21. Witnesses must be examined, after issue joined; and give their testimony in open Court, or it must be taken under a commission. *Id.*

22. When a witness is asked how he knew certain facts about S. R. and answers that he was acquainted with the circumstances of S. R. ever since he could recollect, it will be sufficient to account for the facts stated. *Turner v. Latorre et al.*, 18 L. R. 74.

23. The interest which disqualifies a witness must be the prospect of gaining an advantage, or to profit by the judgment in the cause, in which he is called to testify. *Moffatt v. Murray et al.*, 18 L. R. 357.

24. The builder is a competent witness to testify in a suit between the plasterer and proprietor, for his wages, when the former has been employed independent of the building contract. *McIntosh v. Clannon*, 13 L. R. 469.

25. Since the passage of the act of 1823, excluding the testimony of the maker of a note, in a suit by the holder against the endorser, the maker cannot be admitted as a witness on any grounds; even if he be entirely *disinterested*. *Fortineau v. Boissiere*, 18 L. R. 470.

26. The rule in relation to the competency of witnesses is to be governed by the *lex fori*, with some exceptions, in favor of the local law. *Burkner, Stanton & Co. v. Watt*, 19 L. R. 211.

27. A statute which expressly excludes the drawer of a bill from being a witness in a suit by the holder against the endorser, will not be construed to apply to the *acceptor*. This law being in derogation of the settled rules of evidence will not be extended beyond the latter. *Id.*

28. So, an acceptor who is without interest in a suit by the holder against the endorser of a bill, is a competent witness. *Id.*

29. The guarantor of a note is a competent witness on the part of the maker, in a suit by the endorsee against the latter; for it is the interest of the witness that the plaintiff should recover, and he is called to testify against his own interest. *Shipmans & Co. v. Archinard*, 19 L. R. 471.

30. So, where the plaintiffs received the note sued on *after maturity*, the defendant may produce the letter of the payees and original holders, to show, that the suit is premature, and that a certain time had been allowed for payment. *Id.*

31. The competency of witnesses is a distinct subject of legislative enactment. It is expressly and precisely treated of by the Code (art. 2260); and it lays down all the great and leading principles of the law of evidence. *Waters v. Petrovic & Blanchard*, 19 L. R. 584.

32. The art. 2260 declaring who shall be a competent witness to prove any covenant or fact whatever, in civil matters, makes an exception of any particular covenant or fact whenever parol evidence is admissible under the provisions of the Code; and the act of 27th March, 1823, so far as it renders the maker of a note, etc., *an incompetent witness* in an action against the endorser, is repealed, by the last and repealing article of the Louisiana Code. *Id.*

33. The repealing act of 1828, left in force the Louisiana Code, and also the law respecting the competency of witnesses, leaving the question still open, as to the competency of makers of notes, etc., to be witnesses, etc., to be determined by the Code or act of 1823. *Id.*

34. A notary public, who is the son of one of the endorsers on a note, is not thereby rendered incompetent to make a protest and give notice to all the parties. *Id.*

35. A sheriff, who is the son of the plaintiff, in execution, is nevertheless competent to execute it. *Id.*

36. So the grand-father of a legatee is a competent witness to a will. The official act may be valid, and yet the public officer, be incompetent as a witness in any controversy growing out of the act. *Id.*

WORK BY THE JOB.

1. Where a workman by the job demands more than is authorised by his contract, and on being refused, leaves his work uncompleted, the adverse party may immediately employ other workmen to complete the job; and the former one cannot recover, even if he returns and afterwards offers to perform the work. *McCasken v. Smith*, 16 L. R. 32.

2. A workman should be remunerated for his labor, but must, on his part, comply strictly with his contract. *Id.*

3. A defence that bad shingles were furnished by plaintiff, will not avail the party in his excuse for making a bad roof, when he made no objections to their quality before putting them on. *Mouton v. Droz*, 16 L. R. 111.

4. When a jury passes upon the manner in which a job of work has been performed, their verdict will not be disturbed on slight contradictory evidence. *Id.*

5. Where the demand exceeds five hundred dollars for work and labor done and materials furnished in repairing houses, there must be a registry of some written act or agreement, in order to give a privilege on the property or its proceeds in the hands of the administrator. *Taylor et al. v. Crain's administrator*, 16 L. R. 290.

6. Where it is ascertained that more repairs were required on a steam-boat, than were contemplated between the parties and included in their contract, the contractor will be entitled to the value of his extra work at a fair price, without being liable for the delay occasioned thereby, beyond the time fixed by the contract. *Varion v. Bell*, 17 L. R. 532.

7. The principal or master workman is only entitled to extra pay for his personal attendance when there is no contract fixing the hire and wages of the workmen. *Id.*

END.

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